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THE CASE AGAINST THE CONSTITUTIONALLY COMPELLED FREE EXERCISE EXEMPTION

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Should religious claimants receive an exemption from neutral laws under the free exercise clause of the first amendment? The Author argues that granting a free exercise exemption from neutral laws creates a number of serious problems, including constitutional and definitional ones. He focuses on the arguments that have been advanced in support of the free exercise analysis and the weakness of those arguments. Employment Division, Department of Human Resources v. Smith, *which was decided as this Article was going to press, supports many of the contentions made in this Article and is briefly noted.*

FREE EXERCISE JURISPRUDENCE is unique in constitutional law. Because direct regulation of religious activity almost never occurs, the litigation surrounding free exercise addresses only incidental and inadvertent regulation of religious conduct. For this reason, the issue in a free exercise challenge typically is

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not whether a law is constitutional; the law under attack is usually constitutionally unassailable outside of its incidental effect on religious practice. Rather, the issue is whether certain individuals should be exempted from otherwise valid, neutral laws of general applicability solely because of their religious conviction. The jurisprudence of free exercise, in short, is the jurisprudence of the constitutionally compelled exemption.[1]

There are a number of tensions underlying the notion of the constitutionally compelled exemption, and underlying the constitutional treatment of religion and religious belief, that make free exercise jurisprudence a particularly difficult subject for coherent analysis. First, because special exemptions of any kind raise concerns of undue favoritism, they are normally suspect as violating fundamental constitutional principles of equal treatment.[2] Thus, as the Court noted just last week, the conclusion that the Constitution may require the creation of an exemption directly contradicts the constitutional norm.[3]

Second, the difficulties inherent in exemptions are exacerbated when an exemption favors religion. Beyond general equality notions, the advancement of religion triggers a separate and specific constitutional provision, the establishment clause. Thus, as has been commonly noted, the free exercise claim for constitutionally compelled exemptions leads to a first amendment jurisprudence that simultaneously calls for special deference to religion

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1. Stone, *Constitutionally Compelled Exemption and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 985 (1986). As Dean Stone indicates, the constitutionally compelled exemption is not unique to free exercise. Occasionally, exemptions have been made under the speech and assembly clauses. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982) (the first amendment prohibits a state from compelling disclosure by a minor political party of its campaign contributions and recipients of campaign disbursements when that party has historically been subject to threats and harassment); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (compelled disclosure of the NAACP's membership lists will probably constitute a restraint on its members' freedom of association).

2. *See, e.g.*, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 356 (1980) ("Exemption doctrine has . . . been unable to provide a principled answer to objections that religion-based exemptions contradict the rule of law, violate general notions of equal treatment, and violate the establishment clause." (citations omitted)).

3. Employment Div., Dep't of Human Resources of Or. v. Smith, 110 S. Ct. ____, 58 U.S.L.W. 4433, 4437 (1990) [hereinafter Smith II] ("a private right to ignore generally applicable laws . . . is a constitutional anomaly"); *see also* Stone & Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 584 (noting that constitutionally compelled exemptions are exceptional in constitutional law.).

under the free exercise clause and a prohibition of special deference under the establishment clause.[4]

Third, the claim for constitutionally compelled free exercise exemptions raises virtually insoluble problems in determining when a religious claim is *bona fide*. Such an inquiry necessarily requires investigation into the religiosity and sincerity of the religious belief at stake; however, defining religion and ascertaining sincerity have proved to be highly elusive undertakings.[5] Furthermore, any inquiry into definition or sincerity is itself risky. Allowing the courts or the government to investigate and label beliefs as "irreligious" or "insincere" raises a threat to religious liberty.[6] Moreover, the importance of the sincerity and definition inquiries to free exercise claims for exemption cannot be overstated. In effect, sincerity and religiosity are the only criteria for determining what constitutes a legitimate religious claim. Because religious beliefs are so diverse, as one observer has written, "everything is [potentially] covered by the free exercise clause."[7]

Finally, as has been noted in recent academic literature, religious matters do not easily lend themselves to existing constitutional analysis. Constitutional analysis is individual-rights-oriented;[8] religion is often communal.[9] Rights-oriented thinking

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4. *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673 (1980) (examining the tension between the free exercise clause and the establishment clause). *But see* Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 739 (1986) [hereinafter Lupu, *Keeping the Faith*] (arguing that a close comparison of the principles underlying the religion and equal protection clauses avoids a conflict between the establishment and free exercise clauses).

5. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 174 (1965) ("[I]n no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death, or in final judgment and retribution."); *see also* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove."); Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964) ("to define the limits of religious expression may be impossible").

6. *See infra* text accompanying notes 135-49; *see also* Heins, *"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 157-58 (1981) ("The very inquiry into belief, whether by the courts, by government agencies, or by adverse parties through discovery tends to inhibit religious practice and excessively entangles secular bodies in religious doings. This is true whether the inquisitions probe verity or sincerity." (footnote omitted)).

7. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 783 (1986).

8. *See* Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 985.

9. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 19 [hereinafter

presupposes that the individual has numerous equally viable avenues through which to exercise her freedom of choice; religion is often absolutist.[10] Therefore, placing religion in a legal framework often raises a square-peg/round-hole problem.

A number of years ago I proposed for the free exercise problem a solution that essentially eliminated claims to a constitutionally based free exercise exemption.[11] I argued that free exercise claims advanced by those seeking relief from laws of general applicability should be resolved under the speech clause. In essence, free exercise claimants would be entitled to relief only to the extent their claims would be protected under the speech clause. For example, a religious group would not be entitled to exemption from state restrictions on soliciting contributions unless 1) the solicitation was protected under the speech clause and 2) non-religious groups engaging in solicitation would also be entitled to protection. As the example above suggests, this thesis is comprised of two primary components. The first concerns the degree of constitutional protection to be accorded those presenting free exercise claims. In many circumstances, a claimant may present both a free exercise and a speech claim. In the situation noted above, for example, the religious group seeking exemption from solicitation regulation has a cognizable free exercise and a cognizable speech claim.[12] At the same time, a non-religious group such as a public-interest organization, which might also seek exemption from a solicitation restriction, would present only a speech claim.[13] If free exercise is treated as expression, the result will obviously be that

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McConnell, *Accommodation*]; Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 734 (1986) [hereinafter Tushnet, *Religion*].

10. *See* Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 283 (1989) (contrasting the individual choice inherent in religious freedom with the "most fundamental obligations" imposed on "the religious faithful" by religion itself); Sandel, *Religious Liberty — Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597, 614-15 ("The Court's tendency to assimilate religious liberty to liberty in general . . . confuses the pursuit of preferences with the exercise of duties and so forgets the special concern of religious liberty with the claims of conscientiously encumbered selves.")

11. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

12. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (solicitation by the Krishnas at a fairground implemented both free exercise and speech clauses).

13. *See* Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 962 (1984) (charitable fundraising constitutes speech under the first amendment); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (same).

the religious and non-religious groups will be accorded the same level of protection. In short, under this theory a religious claimant will be entitled to no greater protection than a non-religious claimant, the presence of a free exercise interest notwithstanding.[14]

The second component of the thesis, admittedly more controversial, concerns the scope of religious activities entitled to constitutional protection. It argues that the boundaries of protected free exercise activity should be defined by the boundaries of free speech.[15] Although, according to the current jurisprudence, a claim under the free exercise clause will often also implicate the speech clause, many claims currently recognized as implicating free exercise protection do not easily fit within a speech analysis. For example, the religious objection to working in an armaments factory, recognized as implicating rights of free exercise in *Thomas v. Review Board*,[16] does not, at least under existing speech theory, present a colorable speech claim. Under the theory posited here, the religious claim will not be constitutionally protected unless protection is also extended to parallel objections based on non-religious grounds, such as those of moral philosophy. In short, whether an activity implicates the first amendment ought not turn on whether the activity is religious or secular.

While some commentators have been kind enough to give a title to the free exercise as expression thesis — it is often called the reduction principle[17] — it has captured no adherents, at least in the academic world. Nevertheless, what has struck me since I wrote that article is not the persuasiveness of my own thesis, but rather the infirmity of the arguments made on behalf of the free exercise exemption. Thus, while I recognize that my thesis may be imperfect, it remains the best available approach to the controversial free exercise issue. This Article, therefore, defends the rejection of the constitutionally compelled exemption. Part I describes the theory's doctrinal underpinnings and its relation to current Su-

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14. Marshall, *supra* note 11, at 586-87; *cf.* Prince v. Massachusetts, 321 U.S. 158, 164 (1944) ("[None] of the great liberties insured by the First [Amendment] can be given higher place than the others.").

15. Marshall, *supra* note 11, at 565-72.

16. 450 U.S. 707 (1981).

17. *See* Ingber, *supra* note 10, at 241; Tushet, *Religion*, *supra* note 9, at 713; *see also* Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 307 n.36 (Pepper notes the theory without denominating it "the reduction principle").

preme Court decisions.[18] Part II presents and responds to the arguments in favor of recognizing constitutionally compelled exemptions under the free exercise clause.[19] Part III presents the arguments that compel the rejection of the free exercise claim for exemptions.[20] Part IV examines some of the competing approaches to the free exercise claims for exemption and concludes that, although the approaches may differ significantly in rhetoric, they do not differ significantly in result from that reached here.[21] Part V addresses what appears to be the true underlying reason for opposition to abandonment of the constitutionally compelled free exercise exemption: that the rejection of free exercise is fundamentally the product of an antipathy to religion.[22] Finally, I conclude where I began, with the proposition that free exercise claims for special exemption from neutral laws of general applicability should be rejected.

I. Free Exercise as Expression: Doctrinal Underpinnings

A. Religiously Motivated Activity as Expression

In *Widmar v. Vincent*,[23] the Court reviewed the claim of members of a religious organization who alleged that they were unconstitutionally denied the right to pray together on a state-university campus. The Court held that the appropriate vehicle for review of this constitutional claim was the free speech clause.[24] Prayer, in short, was speech.[25] The *Widmar* Court's reliance on the speech clause was not surprising. It was simply illustrative of a long line of cases which had reviewed under the speech clause the claims of religious organizations to engage in religiously directed practice.[26]

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18. *See infra* text accompanying notes 23-75.
19. *See infra* text accompanying notes 76-134.
20. *See infra* text accompanying notes 135-203.
21. *See infra* text accompanying notes 204-23.
22. *See infra* text accompanying notes 224-53.
23. 454 U.S. 263 (1981).
24. *Id.* at 269.
25. *See id.* at 269-70 n.6 (refuting the dissent's claim that religious worship falls within the free exercise clause and is unprotected by the speech clause).
26. *See infra* note 28 and accompanying text; *see also* Cox v. New Hampshire, 312 U.S. 569 (1941) (challenge by Jehovah's Witnesses to ordinance that required permit before a march could be undertaken analyzed under speech clause); Lovell v. City of Griffin, 303 U.S. 444 (1938) (Jehovah's Witnesses' attack on ordinance proscribing the distribution or sale of literature analyzed under speech clause).

Of course, the observation that two separate constitutional provisions might govern one activity is not surprising. Frequently, constitutional provisions can, and do, overlap.[27] What is surprising, however, is the extent to which the free speech inquiry has dominated the free exercise inquiry. The two freedoms were intertwined in the Jehovah's Witnesses cases of the 1930's and 1940's. In those cases, the Court reviewed the constitutionality of state restrictions on religiously motivated activities such as solicitation, proselytizing, distribution of religious literature, and preaching.[28] In almost all of the cases in which the Jehovah's Witnesses prevailed, the Court found the governing provision to be the speech clause.[29] Although the free exercise clause was occasionally mentioned, in no case did the Court recognize a free exercise claim where a speech claim would have failed.[30] The message of these

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27. *See, e.g.*, Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (The "equal protection claim in this case is closely intertwined with First Amendment interests."); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 20-21 (1975) (In a number of . . . cases involving first amendment interests, the Supreme Court has used the framework of equal protection analysis to limit the government's power to restrict free expression.").

28. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948) (loudspeaker permit requirement invalidated on free speech grounds when Jehovah's Witness used loudspeaker for preaching); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding conviction of Jehovah's Witness under state child-labor law when she allowed her niece to distribute religious literature on the street, despite claim of religious freedom); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (revenue tax on door-to-door sales of religious books and pamphlets found unconstitutional); Cantwell v. Connecticut, 310 U.S. 296 (1940) (restriction on religious solicitation held a violation of the first amendment); *see also* Marshall, *supra* note 11, at 561-65 ("[T]he activities in question in [the Jehovah's Witnesses] cases were as integrally religious as preaching, worship, and proselytizing . . . ."); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1121-30 (1973) (discussing the interrelation of the free exercise clause and the free speech clause in the Jehovah's Witnesses cases).

29. The only possible exception was Follett v. Town of McCormick, 321 U.S. 573 (1944), which indicated that religious speech could be singled out for special constitutional protection. The Court invalidated a license tax imposed on Jehovah's Witnesses when they distributed religious material door-to-door, holding that the tax burdened their free exercise rights under the first amendment. *Id.* at 578. *Follett* has recently been questioned, if not overruled, in Jimmy Swaggart Ministries v. Board of Equalization of Cal., 110 S. Ct. 688, 693-95 (1990) (The Court decided the case "by limiting . . . *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs.").

30. *See* Pfeffer, *supra* note 28, at 1124-26 (the Jehovah's Witnesses cases were based largely on the speech clause). As Professor Leo Pfeffer has noted in analyzing the Supreme Court's decisions in this area:

> The chronicle can be summed up briefly and starkly: In every case in which a claim under the free exercise clause was upheld, it was bracketed with a free speech or free press claim; conversely, whenever free exercise stood alone it was unsuccessful. Realistically, free exercise did not have a separate but equal exis-

cases was clear: No activity was so essentially religious that it warranted protection only under the free exercise clause.[31]

B. Protection for Rights of Conscience Under the Speech Clause

The speech clause's dominion over claims involving religious exercise is not limited to expressive activities. It also includes more passive activities like rights of conscience. In a series of cases, the Court has upheld on speech clause grounds the rights of persons, whether religiously motivated or not, to refrain from certain state-compelled activities because participation in those activities conflicted with their consciences.

West Virginia State Board of Education v. Barnette[32] and, more recently, *Wooley v. Maynard*[33] are examples of cases in which the Supreme Court has recognized that a right to forego an activity because of religious principle is protected under the speech clause. *Barnette* invalidated a compulsory flag-salute requirement that was repugnant to Jehovah's Witnesses. Although the objection was based on religion, the Court, viewing the issue as involving freedom of conscience, found the conscientious objection to have arisen under the speech clause irrespective of its religious basis.[34]

In *Wooley*, claimant George Maynard, a Jehovah's Witness, objected to the New Hampshire license plate motto, "Live Free or Die," on the basis of his moral, ethical, political, and religious beliefs.[35] The Court, again relying on speech rather than on narrower free exercise grounds, upheld Maynard's objection. According to the Court, Maynard presented a "right to refrain from speaking" based on the "broader concept of 'individual freedom of mind,' " which entitled him to protection.[36] Thus, these cases and

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tence, or even one that was separate and unequal; it had practically no existence at all.

Pfeffer, *supra* note 28, at 1130 (footnotes omitted).

31. *See* Marshall, *supra* note 11, at 561-65 (concluding that religious activities typically have been protected under the speech clause rather than the free exercise clause).

32. 319 U.S. 624 (1943).

33. 430 U.S. 705 (1977).

34. *See Barnette*, 319 U.S. at 634-35 (explaining that religion is only one motive for challenging compulsory flag salute and that those without a religious motive can sustain a challenge based on an infringement of the "constitutional liberties of the individual").

35. 430 U.S. at 713.

36. *Id.* at 714 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

others[37] establish that the free exercise clause is not the exclusive guardian for rights of conscience[38] and that significant protection for rights of conscience exists under the speech clause.[39]

C. The Current Free Exercise Jurisprudence

The Supreme Court's current free exercise approach does not, in theory, reject the constitutionally compelled exemption. Beginning in 1963, with *Sherbert v. Verner*,[40] the Court adopted a separate free exercise inquiry which allowed for the creation of constitutionally compelled exemptions for religious exercise in certain circumstances. From 1963 until quite recently, the Court has been consistent in articulating the test it ostensibly applies in its free exercise decisions.[41] According to the Court, government infringement on free exercise rights will be upheld as constitutional only when supported by a compelling state interest.[42] Essentially, this test parallels the strict scrutiny inquiry the Court uses in reviewing purported infringements of the most fundamental consti-

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37. *See* Branti v. Finkel, 445 U.S. 507 (1980) (newly appointed public defender could not dismiss assistants solely because of their political beliefs); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (state law could not constitutionally require non-union public employees to contribute to union political activities which they opposed); Elrod v. Burns, 427 U.S. 347 (1976) (employees could not be forced to pledge allegiance to political party).

38. The Court has been equivocal in deciding whether a right of conscience based on religious or secular beliefs should be protected by the free speech clause or by the religious exercise clause. The Court has employed the free speech clause to uphold the right of a person who may forego an otherwise compulsory activity because of his religious principles. *See* Wooley v. Maynard, 430 U.S. 705 (1977); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). By the same token, a right of conscience lacking religious motivation was held sufficient, on religion clause grounds, to sustain the right of an atheist to object to taking an oath affirming belief in God. *See* Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (state could not compel notary public to declare belief in God); *cf.* Welsh v. United States, 398 U.S. 333 (1970) (statutory provision excluding religious conscientious objectors from the draft applied to person whose objection was based on non-religious grounds).

39. Arguably, *Barnette* and *Wooley* create only a very limited right of conscience — specifically, a right applicable only to objection to state-compelled speech. There is some merit to this argument. The conscience cases have not been extended to all types of activity. *Wooley*, however, appears to stand for something more than simply a right of non-speech. *See* Marshall, *supra* note 11, at 569 n.131 ("In light of *Pruneyard* [a later Supreme Court case], *Wooley* stands for the proposition that freedom of expression also protects a right to be free from governmental attempts to coerce beliefs by forcing individuals to express a message they do not believe in . . . .").

40. 374 U.S. 398 (1963).

41. The Court's recent vacillation with respect to the *Sherbert* test is discussed later. *Infra* text accompanying notes 60-75.

42. *Sherbert*, 374 U.S. at 406-09.

tutional rights.[43] Nevertheless, despite the Court's professed allegiance to a fixed constitutional standard, free exercise jurisprudence has never been consistent in result.[44] Rather, the only consistency that has emerged is the Court's extraordinary reluctance to vindicate free exercise claims outside those protected under the speech clause. It has done so in only five cases, and those five cases are extremely limited in scope. One, *Wisconsin v.*

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43. *See, e.g.*, Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864, 880 (1988) ("In free exercise cases the Supreme Court has followed the same general approach used for certain other constitutional rights such as the right of association, free speech and equal protection"); Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934 (1989) [hereinafter Lupu, *Burdens*] ("the government will prevail only if it proves that a favorable response to these claims and others like them would substantially undermine government interests of unusual importance.").

44. Indeed, the Court's first two modern free exercise cases, *Sherbert* and *Braunfeld v. Brown*, 366 U.S. 599 (1961), were criticized by commentators and members of the Court alike as being hopelessly inconsistent. *See Sherbert*, 374 U.S. at 417 (in his concurring opinion, Justice Stewart remarked, "I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown* . . . . "); R. MORGAN, THE SUPREME COURT AND RELIGION 145-47 (1972) (*Sherbert* and *Braunfeld* cannot be reconciled); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970) (*Sherbert* and *Braunfeld* are as irreconcilable as two cases not involving the same parties can be); Pfeffer, *supra* note 28, at 1139 (impossible to reconcile the cases); Note, *supra* note 2, at 354 n.28 (the two cases have never been adequately reconciled).

In *Braunfeld*, the Court refused to grant an exemption from a Sunday closing law to religious persons whose beliefs forbade them from working on Saturdays, despite the obvious resulting economic hardship. In rejecting the challenge, the Court noted simply that mere inconvenience, economic hardship, or competitive disadvantage was insufficient to compel exemption. 366 U.S. at 605-06. The Court stated that "the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

In *Sherbert*, on the other hand, the Court created an exemption from a state unemployment compensation law for a Seventh-Day Adventist whose religious beliefs forbidding work on Saturdays also resulted in economic consequences. Under the state unemployment-compensation scheme, the religious adherent would be disqualified from receiving unemployment-compensation benefits if she refused Saturday employment. This disqualification placed the claimant in the position of having to choose between adhering to her religious beliefs and forfeiting state benefits, on the one hand, and accepting work in disregard of her religious convictions on the other. The Court concluded that imposing this choice on the appellant was unconstitutional. 374 U.S. at 410. In *Sherbert*, unlike *Braunfeld*, economic disadvantage was enough to compel exemption.

The Court's apparent inconsistencies do not end with *Sherbert* and *Braunfeld*. Other cases, including two involving the Amish, have similarly led to discordant results. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the state's interest in compulsory education was insufficient to override the interest of the Amish in removing their children from public schools. *Id.* at 235-36. Yet, in United States v. Lee, 455 U.S. 252 (1982), the Court upheld the constitutionality of the application of social security taxes to the Amish against their religious objection, although the only governmental interest involved was apparently ease of administration. *Id.* at 258.

Yoder,[45] which held that the Amish were entitled to constitutional exemption from compulsory-education laws, is so tied to its facts that it is without strong precedential value.[46] The Court emphasized the uniqueness of the Amish and conceded that "few other religious groups or sects" would be entitled to similar exemption.[47]

The other cases include the seminal *Sherbert* decision[48] and the trilogy of *Thomas v. Review Board*,[49] *Hobbie v. Unemployment Appeals Commission*,[50] and *Frazee v. Illinois Department of Employment Security*,[51] three cases which are essentially *Sherbert* re-visited. In all four cases, the Court addressed the same issue: whether a state could deny unemployment benefits to an applicant whose failure to be available for work was due to religious conviction. In each case the Court concluded that the free exercise clause prohibited the state from withholding benefits. A claimant could not be forced to choose between adhering to his beliefs and forfeiting state benefits on the one hand, and accepting work that violated his religious convictions on the other.[52]

The unemployment-benefits cases have not, however, been accorded strong precedential force. In subsequent cases, the Court

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45. 406 U.S. 205 (1972).

46. Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 388-89 (1986) (explaining that the "ruling in *Yoder* was firmly anchored to the special situation of the Amish faith" and describing this ruling as tied to these particular facts).

47. *Yoder*, 406 U.S. at 236.

48. *See supra* text accompanying notes 40-42 (discussing *Sherbert* and its role in the development of exemptions from free excercise protection).

49. 450 U.S. 707 (1981) (denial of unemployment compensation to a Jehovah's Witness who quit a job that entailed producing weapons because it conflicted with his religious beliefs violated the free exercise clause).

50. 480 U.S. 136 (1987) (denial of unemployment compensation to Seventh-Day Adventist fired for refusing to work on Saturday violated free exercise clause).

51. 109 S. Ct. 1514 (1989) (denial of unemployment compensation to Christian who refused to work on Sundays violated free exercise clause even though the refusal was not based on the tenets of a particular Christian sect).

52. *Hobbie*, 480 U.S. at 146 ("[T]he state may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work.' " (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963))); *Thomas*, 450 U.S. at 717-18 (conditioning a benefit upon religiously proscribed conduct or denying a benefit because of religiously compelled conduct places a substantial burden on the free exercise of religion); *Sherbert*, 374 U.S. at 410 ("[N]o state may 'exclude individual . . . members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.' " (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947))); *see also Frazee*, 109 S. Ct. at 1516 (citing *Hobbie*, *Thomas* and *Sherbert*).

has denied claims for religious exemption from the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act,[53] tax payment requirements of the Social Security Act,[54] and the government's use of social security number registration requirements in food stamp and welfare programs.[55] In these cases, the governmental interests, primarily ease of administration and fear of fraudulent claims, were "relatively weak."[56] In addition, the Court has been quick to reject free exercise claims that have arisen in prison and military contexts on the grounds that these institutions should be accorded unusual judicial deference.[57] Finally, the Court has unanimously rejected the free exercise claims for special exemption from tax laws that have been brought before it.[58] The denial of religious claims in all of these

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53. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (provisions of the FLSA regarding minimum wages, overtime, and recordkeeping may be complied with without burdening the religious rights of the regulated parties).

54. United States v. Lee, 455 U.S. 252 (1982) (state's limitation on religious liberty in requiring Amish to pay taxes that fund social security benefits was justified by the government's showing that denying such exemptions was essential to the government's interest in providing these benefits).

55. Bowen v. Roy, 476 U.S. 693 (1986) (free exercise clause is not violated by statutory requirement that a state agency use social security number in administering federal food stamp and welfare programs, notwithstanding that the use of social security numbers violates a central tenet of Native American religious belief, which asserts that using numbers harms an individual's spirit). *Bowen* is somewhat ambiguous however, as to the extent that it retreats from *Sherbert*. Apparently there were enough votes to indicate that a majority of the Court might recognize the free exercise claim of a food stamp applicant not to apply for and use a social security number. *Id.* at 714-15 (Blackmun, J., concurring in part); *Id.* at 728-29 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.); *Id.* at 733 (White, J., dissenting). Justice Blackmun, however, considered the issue moot and a four-Justice plurality actually rejected this claim. *See also* Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 429 (1986) ("If the trial court's findings on remand persuade [Justice] Blackmun that the case is not moot, there appear to be five votes to apply the compelling interest test and invalidate the requirement that conscientious objectors personally apply for, and use their social security number.").

56. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 153 (1986) [hereinafter McConnell, *Neutrality*] ("The Court frequently [especially recently] rejects free exercise challenges even when the government's secular programmatic interest is relatively weak.").

57. O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (prison regulations prohibiting Islamic from attending religious services do not violate prisoners' rights under the free exercise clause); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

58. Jimmy Swaggart Ministries v. Board of Equalization of Cal., 110 S. Ct. 688, 698 (1990) (establishment clause does not prohibit imposition of state sales tax on religious organization's sale of religious literature); Bob Jones University v. United States, 461 U.S.

circumstances has led a number of commentators to question whether the Court actually applies strict scrutiny or a substantially less stringent mode of review in free exercise cases.[59]

In fact, in recent cases the Court has begun to waver in its characterization of the free exercise test and has even, in some instances, substantially returned to its pre-*Sherbert* approach. For example, *Bowen v. Roy*[60] and *Lyng v. Northwest Indian Cemetery Protective Association*[61] mark a substantial retreat from the *Sherbert* doctrine. In *Bowen*, the Court was faced with a challenge to a provision in the Social Security Act which required states to use social security numbers in administering certain welfare payments.[62] In *Lyng*, the Court was faced with the claims of a number of native Americans who argued that the free exercise clause prohibited the development of certain religious territory owned by the government but sacred to their religious heritage.[63] Using minimal scrutiny, the Court rejected both challenges, holding that "the Free Exercise Clause cannot be understood to require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[64] The effect of *Lyng* and *Bowen* on the continued viability of the *Sherbert* test is substantial. For one, these cases, at the least, have removed an entire area of potential government infringement on religious exercise, the infringement caused by conflict with internal government affairs, from the compelling state interest test.[65] More importantly, the return to the barest level of scrutiny suggests a possible further erosion of the compelling interest test.[66]

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574 (1983) (denial of tax-exempt status to religiously affiliated university that maintained racially discriminatory policies does not violate free exercise clause).

59. *See, e.g.*, Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 154 (1987) ("[T]he Supreme Court has shown little enthusiasm for strict review in post-*Sherbert* and *Yoder* decisions."); Stone, *supra* note 1, at 994 ("If one looks to the Court's results, rather than its rhetoric, however, one sees that the actual scrutiny is often far from strict.").

60. 476 U.S. 693 (1986).

61. 485 U.S. 439 (1988).

62. *See supra* note 55.

63. *Lyng*, 485 U.S. at 441-42.

64. *Bowen*, 476 U.S. at 699; *Lyng*, 482 U.S. at 448 (quoting *Bowen*, 476 U.S. at 699).

65. As Professor Lupu indicates, this is not a minor category. *See* Lupu, *Burdens*, *supra* note 43, at 945 (the characterization of *Lyng* as an "internal procedures" case demonstrates the breadth of that category).

66. *Bowen*, in fact, came fairly close to rejecting *Sherbert* altogether. The *Bowen* Court was badly fragmented on a second free exercise issue raised by the claimants —

Bowen is also be significant for the manner in which it characterized *Sherbert* and *Thomas*, the only unemployment cases that had been decided at the time. *Bowen* explained those cases as involving discrimination against religion because the unemployment insurance programs at issue recognized only non-religious reasons for an applicant to refuse work.[67] The Court's articulation of its rationale in this manner is potentially far-reaching. It effectively excludes *Sherbert* and *Thomas* from the category of exemption cases and leaves *Yoder* as the only remaining true exemption case.[68]

Yet, even if *Bowen* and *Lyng* are solely internal operations cases and even if *Sherbert*, *Thomas*, *Hobbie*, and *Frazee* are something more than discriminatory treatment cases, there is no question that free exercise protection exists at best in diluted form. Indeed, its most recent free exercise pronouncement, the Court in *Employment Division, Department of Human Resources v. Smith* (*Smith II*),[69] imposed the most far-reaching limitation on *Sherbert* yet. In *Smith II* the Court was faced with the free

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specifically, whether the government could force them to apply for and use social security numbers in contravention of their religious beliefs. *See supra* note 55. The prevailing opinion in *Bowen* announced that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." Bowen v. Roy, 476 U.S. 693, 707-08 (1986). As Justice O'Connor indicated in dissent, this standard relegated free exercise review to the "barest level of minimum scrutiny that the Equal Protection Clause already provides." *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part). *Bowen*'s flirtation with minimum scrutiny was later ostensibly rejected. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (quoting the above statement from Justice O'Connor's partial concurrence in *Bowen* in rejecting *Bowen*'s standard); *see also* Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514, 1518 (1989) (stating that the state interests must be sufficiently compelling to override a legitimate free exercise claim).

67. Bowen v. Roy, 476 U.S. 693, 708 (1986).

68. *Bowen's* characterization of *Sherbert* and *Thomas* as merely discrimination cases was later rejected in Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 141-43 & 142 n.7 (1987). However, Smith II, 110 S. Ct. ____, 58 U.S.L.W. 4433 (1990), suggests that *Bowen's* narrow view of *Sherbert* and the other unemployment cases is very much alive. Citing *Bowen*, the *Smith II* Court announced: "[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at ____, 58 U.S.L.W. at 4436-37 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

In fact, in *Smith II* the Court suggested that even *Yoder* was not a true free exercise exemption case but rather was based on a combination of rights of free exercise along with the rights of parents to direct the upbringing of their children. 110 S. Ct. at ____ n.1, 58 U.S.L.W. at 4436 n.1.

69. 110 S. Ct. ____, 58 U.S.L.W. 4433 (1990).

exercise claims of two Oregon state employees who had engaged in religiously motivated peyote smoking. Characterizing the peyote smoking as work-related misconduct, the state had fired the employees from their positions as drug and alcohol abuse counselors.[70] The Supreme Court rejected their free exercise challenges. The *Smith II* opinion is immediately notable for its limited reading of free exercise precedent. Distinguishing *Sherbert* and *Yoder*,[71] the Court virtually denied even the existence of the constitutionally compelled free exercise exemption. The Court stated that it had "never held that and individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct the state is free to regulate" and that its previous decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .' "[72] A serious question thus remains after *Smith II* as to whether the free exercise exemption will survive in any form.

Even in its narrowest reading, the limitation *Smith II* places on free exercise exemption is dramatic. The Court held that even if it

> were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.
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> . . .To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest in "compelling" — permitting

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70. The most recent *Smith* opinion marks the second time the case has been before the Court. In its first round, the Court signalled its eventual holding in suggesting that free exercise protection would extend to activities that were otherwise "valid." Employment Div., Dep't of Human Resources of Or. v. Smith, 480 U.S. 660, 671 (1988) [hereinafter Smith I]. The Court, nevertheless, remanded the case for a determination of whether peyote smoking for religious purposes would be legal in Oregon. *Id.* at 673-74. On remand the Oregon Supreme Court held that peyote smoking in Oregon was illegal but vindicated the free exercise claim, ostensibly apply the *Sherbert* standard. Smith v. Employment Div., 763 P.2d 146, 148 (Or. 1988).

71. *See supra* note 68. The Court also distinguished *Sherbert* on the grounds that statutory benefit cases invite consideration of the particular circumstance behind an applicants unemployment and, therefore, lend themselves "to individual government assessment of the reasons for the relevant conduct." 110 S. Ct. at ____, 58 U.S.L.W. at 4436. The Court's apparent argument is that a statutory "mechanism for individualized exemptions," *id.* at ____, 58 U.S.L.W. at 4436 (quoting *Bowen*, 476 U.S. at 708), might support a constitutional requirement for free exercise exemptions. The logic behind this contention is not readily apparent.

72. 110 S. Ct. at ____, 58 U.S.L.W. at 4435 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

> him, by virtue of his beliefs, "to become a law unto himself" — contradicts both constitutional tradition and common sense.[73]

Smith II thus holds that rights of free exercise do not extend to criminally proscribed activity.

Because both the power of the criminal law in deterring conduct is so great and the power of the state to criminalize activity so broad, even this narrow reading of *Smith II* is a dramatic undercutting of *Sherbert*.[74] Indeed, the suggestion that at most free exercise protection extends only to activities that are otherwise valid[75] means effectively that its protections are limited only to conditional-benefits cases, a category which not so coincidentally includes *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*. At the least, *Smith* is yet another suggestion that free exercise protection is not expansive.

In summary, the current free exercise jurisprudence disfavors exemptions. The combination of 1) the extraordinarily limited circumstances in which free exercise claims have been upheld; 2) the less-than-compelling instances in which claims have been denied; 3) the *Bowen/Lyng* refusal to extend such protection to matters affecting the government's internal operations; 4) the *Smith II* refusal to extend free exercise protection to otherwise illegal activities; and 5) the significant protection religious activity has been accorded outside of the speech clause, lead to one salient conclusion: The explicit adoption of the position that free exercise claims for exemption should be denied would not produce a dramatic alteration of the current jurisprudence.

II. The Arguments in Favor of Constitutionally Compelled Exemptions for Religious Exercise

Commentators generally do not dispute the conclusions set forth in the previous section. They agree that, prior to *Sherbert*, the protection of free exercise rights was afforded solely by the speech clause[76] and that the results under the Court's current approach differ little, if at all, from the results that would be achieved under a free exercise as expression methodology.[77] They also agree that the creation of free exercise exemptions necessi-

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73. 110 S. Ct. at ____, 58 U.S.L.W. at 4436-37 (citations omitted).
74. *Id.* at ____, 58 U.S.L.W. at 4441 (O'Connor, J., concurring).
75. *Id.* at ____, 58 U.S.L.W. at 4437.
76. *E.g.*, Pepper, *supra* note 17, at 308.
77. *E.g.* Tushnet, *Religion*, *supra* note 9, at 717.

tates inquiry into the sincerity and definition of religious belief and that such investigation itself may be harmful to religious-liberty interests.[78] Finally, commentators generally concede that a theory that seeks exemption for religious exercise in effect advocates preferred treatment for religion and religious belief.[79] Indeed, the central argument of those favoring free exercise exemptions is that the Court's failure to provide special protection to free exercise rights apart from that provided by the speech clause is exactly what is wrong with the current jurisprudence. To paraphrase one commentator, the Court has failed to take free exercise seriously.[80] This section will examine the arguments in favor of the constitutionally compelled free exercise exemption.

A. Text

1. Redundancy

The first argument raised by those seeking more stringent free exercise protection is textual. The first amendment explicitly provides for the protection of rights of free exercise. Some commentators contend that, in order to make this provision meaningful, the free exercise clause must be given its independence from the speech clause, in part through constitutionally compelled exemptions.[81] Accordingly, denying claims for free exercise and redressing such claims only under the speech clause must be misguided, since it would turn the free exercise clause into a textual redundancy.[82]

This textual argument, however, is deficient on a number of grounds. For one, it is descriptively inaccurate. The free exercise position advocated here pertains only to claims for special exemp-

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78. *E.g.*, Pepper, *supra* note 17, at 326.

79. *See* Pfeffer, *surpa* note 28. The commentators differ, as will be discussed subsequently, only in asserting that the sincerity and definition concerns do not outweigh the need for a more stringent free exercise review. *See infra* notes 132-48 & 200-19, and accompanying text.

80. Pepper, *supra* note 17, at 335-36.

81. *See, e.g.*, Tushnet, *Religion, supra* note 9, at 718 (There is a "fundamental difficulty" in the reduction principle's denying that the first amendment text affirms "a distinction between religion and other forms of expression").

82. *See* Widmar v. Vincent, 454 U.S 263, 284 (1981) (White, J., dissenting) ("[T]he Religion Clause would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 336 (1969) (suggesting that such a textual interpretation would be redundant).

tion from laws of general applicability. The free exercise clause may have independent vitality in restricting judicial involvement in intra-church property and employment disputes.[83] More clearly, the clause retains an independent vitality with respect to laws that directly attempt to infringe upon religious freedom.[84] While there have been thankfully few instances of direct persecutions for the free exercise clause to redress, the fact that protection from direct prosecution has been largely unneeded does not make the clause a redundancy.[85]

Nor is the clause a redundancy because even persecutory laws could arguably be invalidated under another constitutional provision, the equal-protection clause.[86] The equal protection clause probably extends to such persecutory laws.[87] Even so, it is hard to see how this point leads to the conclusion that the free exercise clause must be construed as allowing constitutionally compelled exemptions. The subsequent passage and later expansion of the equal protection clause to cover the ground previously protected by the free exercise clause does not mean the protections of the free exercise clause must be expanded to cover new territory.

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83. Admittedly, whether the source of the limitation is the free exercise clause or the establishment clause is not clear. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) (claiming "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine" and opting for "neutral principles of law" when settling church property disputes); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (when faced with a church's decision to defrock a bishop, court looked to First and Fourteenth Amendments in stating that "civil courts shall not disturb the decisions of [the church] in their application to the religious issues of doctrine or polity before them"); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property [because] there are neutral principles of law . . . which can be applied without 'establishing' churches to which property is awarded.").

84. *See* Bowen v. Roy, 476 U.S. 693, 703 (1986) ("[H]istorical instances of religious persecution and intolerance . . . gave concern to those who drafted the free exercise clause."); *see also* Douglas v. City of Jeanette, 319 U.S. 157, 159 (Jackson, J., concurring) (1943) ("[T]he First Amendment separately mention[s] free exercise of religion [because of the] history of religious persecution . . . .").

85. One case, in fact, does fit the description of a law improperly singling out religion for disfavored treatment. McDaniel v. Paty, 435 U.S. 618, 629 (1978) (law prohibiting clergy from holding public office held violative of the free exercise clause).

86. Ingber, *supra* note 10, at 242-43.

87. *See* New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations [subject to their passing a rational-relationship test] . . . .").

Moreover, it is hardly novel to assert that mention in the text of the first amendment does not require constitutionally favored treatment other than protection against direct persecution. The press clause, also located in the first amendment, has been held not to confer a favored status on the media.[88] Rather, the press clause has been interpreted only to protect the media from "invidious discrimination."[89]

Finally, the argument that a textual passage must be given concrete meaning is misleading when that argument is used to advance a specific interpretation of that text. Separate arguments must be given in support of the substance behind the purported textual interpretation. In the free exercise context, proponents of more stringent free exercise exemptions must present arguments that demonstrate why the free exercise clause should be interpreted to require constitutionally compelled exemptions from neutral laws of general applicability. That the text of the first amendment explicitly mentions free exercise does not by itself establish this position.[90]

2. The Use (or Non-Use) of History — A Parenthetical

Historical inquiry also does not support the claim for the constitutionally compelled claim for free exercise exemption. For one, the relevant historical evidence, like that underlying other issues concerning the religion clauses of the first amendment, is unclear. As Dean Choper has stated, "there is no clear record as to the Framers' intent, and such history as there is reflects several vary-

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88. *See*, Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access [for the press] to government information or sources of information within the government's control."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798-801 (1978) (Burger, C.J., concurring) ("[T]he history of the [press] clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege."); Branzburg v. Hayes, 408 U.S. 665, 683 (1972) (The press clause does not create a special privilege from laws of general applicability.); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 963 (2d ed. 1988) ("[P]revailing view is that the press enjoys no special status under the Constitution"). *But see* Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 633-34 (1975) (the press clause does confer a special status, and a refusal to acknowledge this would make the press clause a "constitutional redundancy").

89. *See* L. TRIBE, *supra* note 88, at 963 ("To be sure, despite its separate protection by the first amendment, the prevailing view is that the press enjoys no special status under the Constitution. But the press *is* protected at least from invidious discrimination." (citations omitted)).

90. Smith II, 110 S. Ct. ____, ____, 58 U.S.L.W. 4433, 4435 (1990).

ing purposes."[91] Moreover, any historical evidence must be tempered by the understanding that the first amendment was not intended to apply to the states. Federalism concerns, as well as issues of substantive religious liberty, surrounded the adoption of the religion clauses.[92]

Some observations, however, are interesting, if not dispositive. For example, there is a significant question as to whether even the concept of a religious exemption is consistent with the framers' intellectual framework. The framers obviously were aware that the beliefs of religious adherents could stand in opposition to the religious mandates of the state. The foisting of religious values upon religious dissidents by state enforcement of an established church's precepts was one of the central religion clause concerns.[93] The framers were also aware of another infringement on religious freedom caused by state laws: A number of states imposed disabilities on persons refusing to take oaths, although oath-taking was offensive to the religious tenets of some sects.[94] However, outside of these conflicts with state religious laws or test requirements, it is difficult to find examples where religious objections to the *secular* laws of the state were recognized.[95] In fact, outside of religious

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91. Choper, *supra* note 4, at 676 (footnote omitted).

92. The establishment clause, for example, was intended to protect state churches from a potentially superseding federal establishment. *See generally* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 6 (1982) (amendments proposed at the State Ratifying Conventions "clearly indicated that the states wanted to prevent the establishment of a national religion or the elevation of a particular religious sect to preferred status").

93. *See, e.g.*, McConnell, *Accommodation*, *supra* note 9, at 21-22 ("The principle objects of the Religion Clauses . . . were to prevent coercion (and lesser forms of government pressure) in matters of religion and to encourage a multiplicity of religious sects.").

94. *See* T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 34, 48-50 (1986) (requisite oaths of allegiance for settlers and for legislators in Virginia and in Maryland, respectively, precluded Catholics, who could not pledge to denounce all spiritual power to a foreign prince, and Quakers, who could not subscribe to any oath, from settling or from holding elected office in those states); A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 37 (1964) (many states used religious tests, such as "belief in the Bible's inspiration," as qualifications for holding public office); Bradley, *The No Religious Test and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681-94, 714-20 (1987) (much debate at the Constitutional convention concerning religious requirements for holding public office stemmed from the fact that although religious tests were essentially compatible with notions of "freedom of conscience" and "religious liberty" prevalent at the time, some prominent delegates believed such tests were unjust).

95. The one exception to this is the recognition of possible religious objections to military conscription, but that issue has its own peculiar history. In 1789, Madison proposed a constitutional amendment providing for conscientious-objector exemption from mil-

laws or tests, one can convincingly argue that the framers did *not* envision potential religious exemptions as applying to neutral laws of general applicability. A number of reasons support this contention.

One is that the governing intellectual climate of the late eighteenth century was that of deism, or natural law, which assumed that religious tenets and the laws of temporal authority coincided.[96] The first Supreme Court decisions on free exercise, decided roughly 100 years after the passage of Bill of Rights, are classic, if somewhat vitriolic, examples of this approach to religion and the law of the state. In *Reynolds v. United States*[97] and *Davis*

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itary service for "religiously scrupulous" persons. W. MILLER, THE FIRST LIBERTY 123 (1986). The significance of this as it concerns the historical debate surrounding constitutionally compelled exemptions, however, is not clear. On the one hand, it suggests that the framers were aware of the possibility of conscientious objection to religiously neutral laws. On the other, it indicates that even if the framers were aware of this possibility, they did not view the free exercise clause as addressing the issue. Indeed, the fact that a conscientious-objection amendment was proposed suggests that the free exercise clause was not thought, by itself, to provide for religious exemptions from neutral laws. The rejection of the proposed amendment, in turn, may suggest that the framers also rejected the principle that religious activities should be entitled to special constitutional protection from the application of religiously neutral laws.

Professor McConnell cites the history surrounding the conscientious-objector provision as evidence that the framers indicated that "preferential treatment for religion in some matters is desirable." McConnell, *Accommodation, supra* note 9, at 22. This may be true and it may suggest that the framers intended that there be some room for legislatively created exemptions without raising establishment clause concerns. Professor McConnell parenthetically adds, however, that this history may indicate that preferred treatment for religion is "sometimes mandatory." *Id.* On this point, as the foregoing suggests, he is on less solid ground.

96. S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE, 366-68 (1972); D. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 151-56 (1960).

The influence of natural law on constitutional notions of religious freedom may also be found in some of the states' constitutions as they existed during the late 18th century. Some of these constitutions provided that protection should be given to religious practices not "inconsistent with the peace or safety of this State." *E.g.*, 1 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 383 (1972) (GA. CONST. art. LVI) (1777); 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1338 (1972) (N.Y. CONST. art. XXXVIII (1777)). The limitation of constitutional protection to acts that do not offend peace and safety appears to reflect natural law philosophical belief in the co-extensiveness of religious liberty and temporal authority. Professor McConnell argues that this suggests a right of "religiously based exemptions from facially neutral legislation. . . ." McConnell, *Neutrality, supra* note 56, at 151 n.26. However, this conclusion is tenuous without a clearer definition of what was considered peace and safety. Given that state laws at the time were primarily criminal and not regulatory, violations of secular requirements might very well have been considered outside the public order.

97. 98 U.S. 145 (1878).

v. Beason,[98] for example, the Supreme Court rejected the contention that the Mormon practice of polygamy was religious. In the words of the Court, "to call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."[99] Accordingly, the Court rejected the Mormon protests against restrictions on polygamy as not falling within the definition of religious exercise protected by the first amendment. The Court stated that "[i]t was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."[100] As *Reynolds* and *Davis* suggest, there is little room in a natural-law framework for the creation of a constitutionally compelled religious exemption for activities outside the social norm.

Deism and natural law were not, however, the only philosophies that might have influenced the first amendment; evangelical influence existed as well.[101] Nevertheless, there are additional reasons which suggest that even those not sharing a deistic philosophy would have had difficulty anticipating religious objection to religiously neutral state provisions.

First of all, there were few religiously neutral state provisions with which the religious practices could have been in conflict. The regulatory state did not exist. There were no unemployment compensation benefits programs that might have disadvantaged sabbatarians[102] and no compulsory school programs that might have compromised the Amish or their historical predecessors.[103] For a

98. 133 U.S. 333 (1890).

99. *Id.* at 341-42.

100. *Id.* at 342.

101. The evangelical philosophy of Roger Williams exerted significant influence. *See* M. HOWE, THE GARDEN AND THE WILDERNESS 7 (1965) (As a codification of the metaphor "[t]he wall of separation between church and state," the first amendment embraced Roger Williams's evangelical affirmation of the importance of protecting churches from worldly corruption no less than it adopted the Enlightenment views of Thomas Jefferson.). Professor Pepper argues that the religion clauses may have been a compromise between the two competing philosophies. The establishment clause, he argues, represented the deist position that the state be secular, while the free exercise clause was the *quid pro quo* for the evangelical school, thus providing extraordinary shelter for religion. Pepper, *supra* note 17, at 305-06. Professor Pepper's theory, although plausible, is, as he recognizes, inconclusive as to the exemption issue, in part because it assumes the framers were aware of the constitutional-exemption issue.

102. *Cf.* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (South Carolina unemployment compensation legislation disqualified applicant who failed to accept suitable work because it would require working on the sabbath).

103. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (Wisconsin compulsory school attendance law required Amish to keep their children in a formal education system

conflict to occur, then, it would have had to arise within the state's criminal law.

This conflict, in turn, was unlikely for a second reason. Although there were varieties of religious beliefs at the end of the eighteenth century, there was not a great disparity in the types of religious practices. Rather, the culture of the United States in the late eighteenth century was fairly homogeneous, being composed almost entirely of Christian sects whose practices were unlikely to violate non-religious societal norms.[104] Thus, there existed neither the practices nor the laws that would make a conflict between religious exercise and religiously neutral laws likely.

Finally, there is no suggestion, in any event, that the framers conceived of a constitutionally mandated exemption. Article VI, for example, bans the religious test.[105] It does not create an exemption. Those arguing for a textual interpretation in favor of the constitutionally compelled exemption must also demonstrate that the unique remedy of exemption is consistent with the framers' constitutional purposes. The historical evidence, however, is lacking. History, therefore, is no guide to the purported right to constitutionally compelled free exercise exemptions from religiously neutral laws of general applicability.

B. Equality

A second contention made by supporters of a free exercise exemption is that the creation of such an exemption adds to, rather than subtracts from, equality concerns. This argument contends that the application of neutral regulations creates its own inequality.[106] For example, a Seventh-Day Adventist, who is not entitled to receive unemployment compensation because she is un-

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until the age of sixteen).

104. *See* T. CURRY, *supra* note 94, at 79 ("[The] consensus as to religious freedom was firmly embedded in a Christian and Protestant world view. Colonial writers proclaimed liberty of conscience, but they grounded that liberty in the unexamined assumption that the legal systems of the time would uphold and maintain a Christian and Protestant State.").

105. U.S. CONST., art. VI, cl. 3.

106. *See* Note, *Developments in the Law — Religion and the State*, 100 HARV. L. REV. 1606, 1719 (1987) ("[I]n every instance, accommodation appears both to serve and to undermine equality."); *see also* McConnell, *Accommodation*, *supra* note 9, at 8-13 (discussing the burden placed on religious adherents by "neutral" laws); Pepper, *supra* note 17, at 314 (majority inadvertently burdening minority through facially neutral laws). The strongest defense of the free exercise clause as a provision assuring the protection of minority religions is found in Galanter, *Religious Freedom in the United States: "A Turning Point,"* 1966 WIS. L. REV. 217.

available to work on Saturdays, is at a disadvantage with those whose religious beliefs do not forbid Saturday employment and who, if they are religiously forbidden from working on Sundays, may already be protected by legislative exemption. Creating an exemption for the sabbatarian therefore equalizes her rights with those of other religious adherents. Creation of this exemption also ensures that a religious majority, while never likely to place disabilities on the exercise of its own beliefs, might "inadvertently" inhibit the religious rights of minority groups.[107] Professor Tushnet has questioned the accuracy of this argument. As he points out, there probably is no mythical majority intentionally protecting its own religious beliefs and "inadvertently" placing disabilities on the beliefs of others: "In a pluralistic society with crosscutting group memberships, the overall distribution of benefits and burdens is likely to be reasonably fair."[108]

Yet, even aside from Tushnet's criticism, inequality among religions is not the governing equality concern. Even if a special exemption for religious adherents equalizes the effects of otherwise neutral laws on all religious believers, it does not equalize the effects of those laws on individuals presenting parallel secular objections. Again, those advocating a free exercise exemption for religious groups must convincingly argue that religious exercise is special.

C. Pluralism

Some commentators also rely heavily on notions of pluralism to support expanded free exercise protection.[109] The value in pluralism has been succinctly stated by Justice Brennan: It is beneficial to have diverse sub-groups within society because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."[110]

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107. Pepper, *supra* note 17, at 314.

108. Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1700 (1988) [hereinafter Tushnet, *Emerging Principle*].

109. *E.g.*, McConnell, *Accommodation, supra* note 9, at 14-24 (arguing that accommodation of religion follows directly from an interpretation of the religion clauses based on religious pluralism). While not relying heavily on pluralism, Professor Tushnet acknowledges that pluralism supports accommodation. Tushnet, *Emerging Principle, supra* note 108, at 1699-1701.

110. Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan J., concurring); *see also* Van Patten, *In the End is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 ST. LOUIS U.L.J. 1, 84 (1983) ("The diversity of private associations, including

Actually, there are three separate values inherent in the pluralistic model. The first is the capacity of religious groups to act as mediating institutions between the individual and government. Communal groups, such as religious organizations, "foster diversity and act as critical buffers between the individual and the power of the state."[111]

The second value of religious pluralism is its capacity to provide moral principles that help mold the citizenry into the sort of virtuous society that allows self-government to flourish.[112] In the tradition of civic republicanism, religion imbues the people with the sense of responsibility and veneration necessary for the republic to succeed.[113]

The third value of pluralism is simply that it is desireable in itself. Multiplicity of religion is arguably not only a buffer against state power and a source of moral values in the populace, but also a factor in cultural diversity.

The problem with the pluralism theory is not that it is misguided. Indeed, its aims and structure are highly attractive. Its deficiency is that it is not an argument for special protection for religious exercise. The values inherent in pluralism are also advanced by the protection of non-religious groups.

First, secular mediating groups such as ethnic associations and socio-political organizations also serve as buffers between the individual and the state.[114] Religious groups are, after all, not the

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religious associations, provides a balance in the extended republic against the domination of any particular group." (footnote omitted)). For an excellent detailed discussion of religious groups, see Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

111. Roberts v. United States Jaycees, 468 U.S 609, 619 (1984).

112. *See* Gedicks, *supra* note 110, at 161-62; McConnell, *Accommodation*, *supra* note 9, at 17-20 (discussing religion as a source of public virtue); Tushnet, *Religion*, *supra* note 9, at 735-37 (discussing religion as a source of moral responsibility and governmental stability).

113. *See generally* Michelman, *The Supreme Court 1985 Term: Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986) (discussing republicanism in American constitutional thought). According to Professor McConnell, the civic republican conception that there should be a diversity of sects from which moral ideas could be generated shaped the vision of the framers of the religion clauses, particularly Madison. According to McConnell, "[l]iberal political theory thus favored religion, but it did not favor any one religion. [Rather], [i]t guaranteed religious freedom in the hope and expectation that religious observance would flourish, and with it morality and self-restraint among the people." McConnell, *Accommodation*, *supra* note 9, at 19-20. The values of religious pluralism are also discussed in M. MARTY, RELIGION AND REPUBLIC (1987).

114. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1034-35 (1983); *see also* Linder, *Freedom of Ass'n After Roberts v. United States*

sole mediating institutions in society.[115] Second, religion does not lay claim to a monopoly in the inculcation of civic virtue. As Professor Tushnet has explained, "[r]eligion may now be one of several methods of inculcating civic virtue."[116] Finally, cultural diversity is not solely the product of religious multiplicity. Other types of heterogeneity — ethnic, lingual, and regional — enrich the culture as well.[117]

The pluralist argument thus fails to establish why only religious groups, and not secular groups that share the same characteristics, merit special treatment. In short, the pluralist argument is either one for broad associational rights that include, but extend beyond, religious affiliations to other types of societal subgroups,[118] or it is an argument for the development of a constitutional theory that assimilates community rights into its individual-rights methodology.[119] The pluralist argument does not, however, support special exemption for religion.

D. The Special Nature of Religion

Religion, some commentators contend, is not simply another belief system. Unlike other types of beliefs, religion seeks a truth and a morality that stem from divine authority. Accordingly, the obligations religion places on its adherents transcend those imposed by temporal sources. In the words of Professor McConnell, "religious claims — if true — are prior to and of greater dignity than the claims of the state [and the individual]."[120]

As Professor Garvey explains, the belief in a transcendent au-

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Jaycees, 82 MICH. L. REV. 1878, 1880-81 (1984).

115. *See, e.g.*, Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 WASH. & LEE L. REV. 347, 369-70 (1984) (socio-political groups such as those based on an ethnic or political alliance also form intermediate communities which may shield the individual from the state).

116. Tushnet, *Emerging Principle*, *supra* note 108, at 1696.

117. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978) (plurality opinion) ("[O]ur tradition and experience lend support to the view that the contribution of diversity [at an academic institution] is substantial.").

118. *See* Garet, *supra* note 114, at 1034-35 ("[A] decision such as *Yoder* respects a group right referred back to groupness or communality as its underlying claiming good."). Marshall, *Discrimination and the Right of Association*, 81 N.W. U.L. REV. 68, 85-88 (1986) (arguing that a "right of cultural association," which would include national origin, race, or religious affiliation, ought to be recognized).

119. *See, e.g.*, Tushnet, *Religion*, *supra* note 9, at 736-38 (arguing that the republican tradition can be invoked to "establish . . . a different balance between individualism and community' [a balance that is] grounded in the Constitution.").

120. McConnell, *Accommodation*, *supra* note 9, at 15.

thority has significant ramifications for its adherents.[121] If the law of the state and the religious tenet differ, the religious adherent is in the unwelcome position of being subject to conflicting duties.[122] This, in turn, leads to two unpleasant options. On the one hand, the religious adherent may abandon her religious belief to follow the dictates of state law. If so, she may incur a "special cruelty," particularly if the violation of the tenet is believed to have "extratemporal consequences."[123] On the other hand, she may choose to act in allegiance to her religious faith and violate state law. This choice leads to the equally unsatisfactory result of civil disobedience and its accompanying social costs, including "disproportionate investment of enforcement resources, and loss of respect for law," as well as potential earthly punishment for the believer.[124]

These concerns are indisputably serious; however, none are unique to religion. Conflicting duties occur anytime one's beliefs conflict with those of the state, whether those beliefs are religious or not. Some beliefs, like those underlying an individual's objection to the draft, may be moral or political.[125] Other beliefs bringing the individual in conflict with the state may be based on more personal concerns, including those akin to privacy rights in intimate association protected under the due process clause. The same Board of Unemployment Compensation that denied unemployment benefits to Eddie Thomas for failing to work in an armaments factory also denied benefits to a person whose failure to be available for work was due to strong convictions about parental obligations.[126]

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121. Garvey, *supra* note 7, at 779. Not all religions, of course, adopt the notion of transcendental authority. *See, e.g.*, Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 832 (1984) (stating that some religions — Buddhism, for example — have nothing "to do with the concept of a creator God").

122. Garvey, *supra* note 7, at 794-95.

123. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 599; *see also* Garvey, *supra* note 7, at 793 (the fear of extratemporal consequences as a cause of suffering "provides an explanation for the uniqueness of religious liberty").

124. Garvey, *supra* note 7, at 795-96.

125. *See* Welsh v. United States, 398 U.S. 333, 337 (1970) (objections to killing in war based upon ethical and moral beliefs); United States v. O'Brien, 391 U.S. 367, 370 (1968) (opposition to draft based on political and social objection to war).

126. Gray v. Dobbs House, 357 N.E.2d 900, 903 (Ind. Ct. App. 1976) ("Although parental obligations no doubt constitute good personal reason for termination of employment, they nevertheless lack the objective nexus with employment envisioned by the Act."); *cf.* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (identifying intimate personal relationships as a source of constitutional protection).

The conclusion that there is a special suffering associated with the violation of a religious tenet is also overbroad at best. Not all religious beliefs are held with equal fervor by the religious adherent, nor are religious beliefs necessarily more deeply felt than secular beliefs. A person who has a secular, moral objection to killing in war and a religious objection to working on the Sabbath might well suffer a greater psychic harm in being forced to kill than in being forced to work.

Avoiding civil disobedience is also not a persuasive reason to single out religion for special benefits. One reason, of course, is that sacrificing important governmental interests because of fears of non-compliance raises its own concerns.[127] More importantly, the problem of civil disobedience is again not unique to religion. Professor Garvey has drawn a compelling illustration of the harm that might have been caused if Wisconsin chose to arrest the members of the Amish community who refused the requirements of compulsory education; however, even Garvey concludes that concerns of civil disobedience alone do not set religious belief apart from other belief systems.[128]

Professor Garvey ultimately concludes that what separates religion from non-religion is that the former "is a lot like insanity."[129] According to Garvey, this conclusion has two aspects. The first is cognitive. Garvey asserts that the process of understanding reality through religious beliefs is dissimilar to developing that understanding through practical reasoning — the cognitive process by which reality is generally understood in the society.[130] The second aspect is volitional. The religious believer is compelled by his belief to engage in certain activities. He therefore lacks the will in the same way an insane person lacks the will

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127. As Gail Merel has warned:

> Government is ultimately premised upon the subordination of individual conscience to majority rule. Safeguards can, of course, be provided for minority rights, and checks may be placed on purely majoritarian rule; in the end, however, government functions by the passage of a single law, the making of a final decision, the determination of a particular course of action. To permit special exceptions for activities actually singled out by the first amendment is, in itself, administratively difficult. But to protect the exercise of conscience in all things would effectively render every citizen, at his own option, a law unto himself.

Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 812 (1978) (citations omitted).

128. Garvey, *supra* note 7, at 797.

129. *Id.* at 798.

130. *Id.* ("The . . . problem of understanding natural events in a way wholly at odds with the rest of society occurs frequently in a religious context.")

to conform his practices to societal expectations.[131] For this reason, Garvey suggests, exempting the religious adherent is appropriate.

There are two deficiencies in Garvey's thesis. First, it is not at all clear that religion is the only belief system that bases its understanding of the world upon a cognition other than that achieved through practical reasoning. Most other types of beliefs and moral values have non-rational components. Indeed, the contentions that practical reasoning leads to an understanding of reality and that morality may be understood through rational processes are themselves ultimately based on no more than their own non-rational, *a priori* assumptions.[132]

Second, it is unclear that, even if lack of volition underlies religious belief, the appropriate response is to defer to this non-volitional understanding by creating special exemptions. There is, after all, a presumption of free will that underlies the principle of individual freedom expressed throughout the Constitution, and there is a principle of voluntariness which specifically underlies American religion and the religion clauses.[133] The analogy to insanity alone does not support the free exercise exemption.

Nevertheless, although no one factor conclusively establishes a special status for religion and religious belief for constitutional law purposes, it may be, as Garvey suggests, that the aggregation of a number of factors leads to the conclusion that religion is enti-

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131. *Id.* at 801 ("[F]or the claimant, there is no question of choice. We protect their freedom, then, because they are not free.").

132. *See generally* A. CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 119 (J. O'Brien trans. 1969) (attacking the purported certainty of rationality and examining human existence in a world whose understanding is beyond human reasoning); R. RORTY, CONSEQUENCES OF PRAGMATISM 160-75 (1982) (detailed discussions about the doctrines of pragmatism, relativism, and irrationalism); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 9, 30-38 (1985) (discussing the fallacy that rational consideration will ultimately lead to an objectively correct result in decision procedures).

133. *See, e.g.*, M. MARTY, *supra* note 113, at 46 ("Theological exceptions abound, but the psychology and sociology of American religion strongly reinforce the voluntaryistic outlook."); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 81 HARV. L. REV. 513, 517 (1968) ("Religious voluntarism, of course, is an important aspect of the freedom of conscience guaranteed by the free exercise clause. But a broad interpretation of the establishment clause also gives vent to the social dimension of this value . . . ."); Sandel, *supra* note 10, at 608 ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all . . . . *[R]eligious beliefs worthy of respect are the product of free and voluntary choice by the faithful* . . . ." (quoting Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnote omitted) (emphasis added))).

tled to special protection.[134] As will be shown in the next section, however, the constitutional difficulties created by special protection for religion militate against the conclusion that special treatment for religion is constitutionally compelled.

III. The Arguments Against the Constitutionally Compelled Free Exercise Exemption

A. Avoiding The Sincerity and Definition Inquiry

Creating constitutionally compelled exemptions under the free exercise clause necessitates inquiry into the sincerity and religiosity of the religious claim. This inquiry poses its own threat to religious values.[135] On the other hand, abandoning the free exercise exemption obviates the need for defining religion in free exercise cases[136] and wholly avoids judicial inquiries into sincerity, except in cases involving legislatively created exemptions.[137] Avoiding religious inquiry thus promotes religious liberty.

The problems inherent in defining religion and the harms definition creates for free exercise purposes are, of course, apparent. As Professor Stanley Ingber has argued:

> The danger in defining religion lies in the possibility of violating the very purpose of the religion clauses by proposing a definition that excludes non-traditional religious beliefs from the ambit of the first amendment. To define religion is to limit it . . . . [A]ny attempt to fulfill this mandate risks a delineation of a religious orthodoxy.[138]

This exclusion of non-traditional beliefs is one of the most serious threats to religious values. As Justice Stevens has argued, evaluating the merits of religious claims creates "[t]he risk that government approval of some and disapproval of others will be

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134. Garvey, *supra* note 7, at 794.

135. *See, e.g.*, Weiss, *supra* note 5, at 622 (noting that, in attempting to set standards for religious exemption and necessarily defining "religion" in the process, certain religious groups will be excluded and freedom of religion will thereby be harmed); Heins, *supra* note 6, at 166 (arguing that "to allow adjudication of the verity of beliefs would be to oppress the weaker or less popular faiths by treating them differently from the more popular ones, thereby 'establishing' the latter").

136. A definition of religion will still be required in establishment clause cases. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (teaching of transcendental meditation in public schools held to constitute establishment of religion).

137. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965) (defining religion for purposes of conscientious objector provision in the Selective Service Act).

138. Ingber, *supra* note 10, at 241.

perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."[139] Stevens's position is supported by two of the Court's most famous pronouncements on the illegitimacy of legal determination of orthodoxy. In *Watson v. Jones*,[140] the Court stated that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[141] In *West Virginia State Board of Education v. Barnette*,[142] it declared, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[143]

Similar problems exist with sincerity. If protection of religious practice means anything, it means that the government cannot reject as false particular religious creeds. Yet how can one judge the sincerity of an individual's belief without judging the reasonableness of the belief? As Justice Jackson argued in *United States v. Ballard*, the problem is essentially insoluble.[144]

Moreover, there is difficulty even in the act of inquiring into an individual's religious beliefs, since such an inquiry raises the troublesome spectre of state inquisition into religious motivation and governmental attempts to impeach professed religious convictions. According to Chief Justice Warren: "[A] state-conducted inquiry into the sincerity of the individual's religious beliefs [is] a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees."[145]

It is, thus, not an overstatement to suggest that avoiding the sincerity and religiosity inquiries might alone support abandoning the free exercise exemption. When one combines the possibility that any activity could potentially be characterized as religious with the conclusion that there are no appropriate ways to distinguish legitimate from illegitimate religious assertions, the case against expanding free exercise protection becomes more compelling.[146] Indeed, this concern alone has motivated Justice Stevens

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139. United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).
140. 80 U.S. (13 Wall.) 679 (1871).
141. *Id.* at 728.
142. 319 U.S. 624 (1943).
143. *Id.* at 642 (1943).
144. 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting).
145. Braunfeld v. Brown, 366 U.S. 599, 609 (1961).
146. Professor Pepper states that "[l]urking behind the inconsistency in the last twenty-five years of Supreme Court free exercise doctrine may be an unwillingness to con-

to suggest placing a virtually "insurmountable burden" on the free exercise claimant seeking an exemption from a neutral law of general applicability.[147]

More interestingly, this concern with extensive inquiries into religious beliefs has led some of the strongest proponents of expansive free exercise protection to offer surprisingly limited standards for religious claims to special exemption. Professor McConnell would vindicate such claims primarily when the state has already employed a mechanism for "case-by-case determinations of a subjective nature by responsible officials, or [when] the religious accommodation can be reduced to a simple objective rule that can be administered at the operational level."[148] Concern for the sincerity and religiosity issues has led Professor Lupu to construct a threshold inquiry into what constitutes a burden on free exercise, in part, to weed out free exercise claims before reaching the sincerity and religiosity determinations.[149] Professor Pepper refuses to shy away from the sincerity inquiry but ultimately adopts a definition for deciding what qualifies as "religion" that expands the understanding of "religion" to protect "a core area of liberty" termed "conscience."[150] The merits of these positions will be discussed below.[151] The point is that even free exercise exemption advocates recognize that powerful arguments in favor of the protection of religion and religious belief support the elimination of the constitutionally compelled free exercise exemption.

B. Elimination of Favoritism for Religious Belief and Exercise

The second argument against the free exercise claim for exemption is that it seeks a favoritism for religion that itself raises serious constitutional concerns. The concern with such favoritism is most evident when the exemption sought is from regulatory measures that directly affect the dissemination of ideas. The exemption of religious proponents vests them with a distinct competitive advantage over their secular counterparts. For example, assume a rule that restricts all solicitations at a state fair to fixed-

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front the likelihood of insincere claims." Pepper, *supra* note 17, at 325.

147. United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

148. McConnell, *Neutrality*, *supra* note 56, at 156.

149. Lupu, *Burdens*, *supra* note 43, at 953-60.

150. Pepper, *supra* note 17, at 331-32.

151. *See infra* notes 203-22 and accompanying text.

booth locations.[152] If a religious organization, because of the religious belief of its members, is exempted from the rule and accordingly is allowed to engage in unrestricted face-to-face solicitation, it will be better able to raise money, expound its philosophy, and seek converts than will the non-religious groups that remain restricted to fixed locations. Thus, given a religious and a secular organization of similar size and budget, the exempted religious group will be better placed than its secular counterpart to raise funds and exert its influence — a significant advantage given the Supreme Court's canon that "money is speech."[153] The special exemption, in effect, grants to those advancing religious views more power than their secular counterparts.

This favoritism toward religious organizations, of course, violates the central principle in speech jurisprudence that every idea has equal dignity in the competition for acceptance in the marketplace of ideas.[154] Providing greater protection for religious speakers suggests, in direct opposition to this principle, that there exists a constitutional hierarchy in which religious ideas occupy a higher position than secular ideas. This preferred status undercuts the "equal liberty of expression guaranteed by the first amendment."[155]

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152. These are substantially the facts of Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

153. Buckley v. Valeo, 424 U.S. 1, 16 (1976); *see also* Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 21 (expenditures of money are themselves "speech"). For a criticism of this position, see Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) ("Nothing in the first amendment . . . commits us to the dogma that money is speech.").

154. Karst, *supra* note 27, at 20, 23-26 ("The principle of equal liberty of expression underlies important purposes of the first amendment." These purposes are "self-government," "the search for truth," and "self-expression and equal dignity.").

155. *Id.* at 26; *see* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("But above all else, the first amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also* Widmar v. Vincent, 454 U.S. 263, 267-68 & 267 n.5 (1982) (same); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." (footnote omitted)); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (same); *cf.* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 83 (1978) [hereinafter Stone, *Restrictions*] (questioning whether the Supreme Court should apply the same standard of review used to test content-based restrictions defined "in terms of a particular viewpoint, idea, or item of information" to test those defined "in terms of expression about an entire subject"). *See generally* Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 727 (1980) (" '[A]bove all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter

Not surprisingly, the Court's reliance on equality-of-ideas notions has consistently led it to reject claims under the free exercise clause in circumstances where cognizable speech claims would be denied.[156] For example, in *Prince v. Massachusetts*,[157] in rejecting a claim for a greater right of free exercise, the Court had this to say:

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First [Amendment] can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[158]

Speech clause problems, however, are not the only concerns. Favoritism for religious speech over non-religious speech is also antithetical to establishment clause policies. Singling out religion for special treatment raises establishment concerns in any case, but as the recent *Texas Monthly* case attests, the difficulty is exacerbated when the special treatment concerns speech.[159] Part of

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or its content.' That, in a nutshell, is the principle of content neutrality." (citation omitted)); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981) (examining "the nature of content discrimination" and the appropriate standard of judicial review); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982) (examining the doctrine of content-neutrality); Stone, *Content Regulation And The First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) ("Perhaps the most intriguing feature of contemporary first amendment doctrine is the increasingly invoked distinction between content-based and content-neutral restrictions on expression.").

156. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (no violation of free exercise clause where Minnesota Agricultural Society rule required members of International Society for Krishna Consciousness to confine solicitation activities and sales and distribution of religious materials to a fixed location); Prince v. Massachusetts, 321 U.S. 158 (1944) (no violation of free exercise clause where Massachusetts child-labor laws precluded Jehovah's Witness from supplying minor girl with religious periodicals).

157. 321 U.S. 158 (1944).

158. *Id.* at 164.

159. Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 905 (1989) ("Texas' sales tax

the underlying theory of freedom of speech is that it creates the discourse necessary for self-government.[160] The establishment clause, however, imposes a unique limitation on direct religious influence over government that does not apply to non-religious sources.[161] Although religion undoubtedly should play a part in the political process,[162] it is untenable to assert that religion ought

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exemption for religious publications violates the First Amendment . . . ."); *id.* (Blackmun, J., concurring) (the case "at issue touches upon values that underlie three different clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause. As indicated by the [four] different opinions issued in this case today, harmonizing these several values is not an easy task.").

160. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 96 (1960) ("It is that prohibition [against interference with people's right to participate in electoral activities that] the first amendment expresses in its guarding of the freedom of speech, press, assembly, and petition."); *see also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (The framers "indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies."); Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 ("The [First] Amendment has a 'central meaning' — a core of protection of speech without which democracy cannot function . . . ."); Meiklejohn, *The First Amendment is An Absolute*, 1961 SUP. CT. REV. 245, 256 ("[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, as far as possible, a ballot should express. These . . . must suffer no abridgement of their freedom."); Stone, *Restrictions*, *supra* note 155, at 101 (one of the purposes of free speech is to allow the "marketplace of ideas" to function, and it is this process which is "essential to the effective operation of a self-governing society").

161. *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (while political debate is necessary to our system of government, the establishment clause was intended to protect the democratic system from "debate and division" along religious lines); Walz v. Tax Comm'n, 397 U.S. 664, 694 (1969) (Harlan, J., concurring) ("What is at stake [in the establishment clause cases] as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

162. For support for this proposition, see M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 7 (1988) (arguing that moral beliefs, including those religious in character, must be a principle ground for political deliberation); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 224-34 (1980) (arguing that the "political divisiveness" test, which allows courts to invalidate legislation that might create controversy among religious groups, is bad public policy); Gedicks & Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1587 (1987) (arguing for "reintegrating serious religious thought and belief into our culture, particularly our political culture, as legitimate predicates for public ac-

to have special advantage in the public debate. Giving a competitive advantage to religious speech in the marketplace of ideas and in the discourse that leads to self-governance turns the establishment clause on its head.

Perhaps because of the speech and establishment clause problems, the consensus is that when speech and religion overlap, special protection for free exercise claims need not be maintained.[163] The primary concern is what is to be protected. Yet, to find the scope of free exercise broader than the scope of free speech ultimately leads to the same kinds of concerns.

The *Thomas* case, for example, involved a person who objected to working in an armaments factory.[164] Because the person's objection was based on religious belief, the Court found it constitutionally protected. The Court was equally clear, however, that if the claim were based on secular moral grounds, it would be denied.[165] But why should the objection on religious grounds to working in an armaments factory be entitled to constitutional protection, while an objection to the same work based on moral grounds be denied? A similar problem exists in *Yoder*.[166] Why should the Amish be exempted from Wisconsin compulsory school education while other groups that desire to have their children free of public school influence not be entitled to the exclusion?[167]

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tion"); Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1985-86) [hereinafter, Greenawalt, *Rationality*] ("[P]eople should feel as free to rely on religious perspectives as on other perspectives that help determine political positions.").

163. *See, e.g.*, McConnell, *Neutrality*, *supra* note 56, at 149 (giving as an example of neutral protection of religion a case in which religious speakers seeking access to public parks needed only to ask for the same access accorded any other speaker); Pfeffer, *supra* note 28, at 1116 ("[T]he Court [will not necessarily] accept a free exercise claim when in a similar fact situation it has rejected free speech claims."). *But see* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 777 (1984) [hereinafter Greenawalt, *Religion*] ("Any assumption that the broader liberty of conscience derived from the free speech clause will always encompass a valid free exercise claim is definitely mistaken in the area of communication and very likely wrong in the area of belief." (footnote omitted)); Pfeffer, *supra* note 28, at 1115 (arguing that after *Yoder* the free exercise clause appealed "to have achieved elevated status and more than equal significance in the scheme of first amendment protection.")

164. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

165. *Id.* at 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause.").

166. Wisconsin v. Yoder, 406 U.S. 205 (1972).

167. The *Yoder* Court specifically stated that a parallel non-religious claim would be denied. *Id.* at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.").

If only the religion claim is protected, religious beliefs are accorded a more favorable position in the constitutional hierarchy than are secular beliefs. However, as we have already seen, such a hierarchy is constitutionally suspect, since it denies religious and secular beliefs equal constitutional dignity.[168]

Moreover, as with expressive religious activity, favored treatment raises concerns of political effect. Religious beliefs do not exist in a vacuum and, even when they are not political in themselves, they can evolve to political dimensions.[169] In addition to the obviously political and religious issues of abortion and capital punishment, consider also for example, as Professor Greenawalt has done, for example, the religious influence on such issues as animal rights and the environment.[170] Indeed, the infusion of religious beliefs into the political process is an important, necessary, and perhaps even unavoidable part of democratic decision-making.[171] Similarly, as has been noted in civic-republicanism theory, religion and religious belief promote the values in the citizenry that are necessary for responsible public decision-making.[172] Religious belief, in short, cannot and should not be segregated from its political effect.

If this is so, however, then freeing religious exercise from neutral strictures gives religious beliefs an unfair advantage over competing value systems in the political marketplace. If religious beliefs are subsidized in a way secular beliefs are not (as in *Thomas*) or if they are insulated from the societal forces that routinely challenge any belief system (as in *Yoder* or as was requested by the plaintiffs in *Mozert v. Hawkins County Board of Education*,[173] the public school textbooks case), they become rein-

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168. *See supra* notes 154-55 and accompanying text.

169. *See* Note, *supra* note 2, at 369 ("Any religion-based exemption [from law] arguably has effects outside the religious territory.").

170. *See* Greenawalt, *Religion*, *supra* note 163, at 1020.

171. *See* sources cited *supra* note 163.

172. *See* McConnell, *Accommodation*, *supra* note 9, at 19 ("It was accordingly widely thought by the founders that republican self-government could not succeed unless religion continued to foster a moral sense in the people."); Tushnet, *Religion*, *supra* note 9, at 702 (suggesting "that a reconstituted law of religion might draw on the republican tradition to alleviate existing intellectual disarray by providing to nonbelievers as well as believers a view of the law that affirms the connectedness that religious belief mobilizes and that liberalism denies").

173. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988) (plaintiffs argued "that they have sincere religious beliefs which are contrary to the values taught or indicated by the reading textbooks [used in the public school system,] and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to

forced with an artificial vitality. This favoring of religious ideas runs counter to both establishment clause concerns with religious domination of the political process and speech clause concerns with the need for equality in the marketplace of ideas.

Finally, the creation of constitutionally compelled protection for religious beliefs is also problematic because it judicially legitimizes the religious belief in comparison to the non-religious. The moral authority of the Court is placed, in effect, behind the religious belief.[174] In defending special free exercise protection, Professor Ira Lupu has stated the issue well: "Free exercise exemptions from general regulatory statutes are a form of constitutional tribute to individual acts of faith."[175] Lupu makes the statement approvingly; however, the claim that religion merits special tribute seems ill-founded in light of establishment and equality-of-ideas concerns. This claim also appears to contradict the seminal principles announced in *Watson v. Jones*[176] and *West Virginia State Board of Education v. Barnette*.[177] Since the law cannot promote orthodoxy in the truth of belief, so it would seem, the law should not support orthodoxy in the type of belief.

C. Doctrinal Concerns

Abandoning the free exercise claim for exemption is also supported by doctrinal concerns. As we have seen, the Court's attempts to grapple with *Sherbert*'s doctrinal support of exemptions have been chaotic.[178] The reason for this may be that doctrinal inconsistency is an inevitable product of the *Sherbert* methodology. As Justice Scalia has explained, the systematic use of a compelling interest test, taken seriously, would necessarily create havoc in a society comprised of diverse religious beliefs.[179] It is

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read the books").

174. *See generally* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS ix (1982) (questioning "the legitimacy of constitutional policymaking (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution (extraconstitutional policymaking).").

175. Lupu, *Keeping the Faith*, *supra* note 4, at 769.

176. 80 U.S. (13 Wall.) 679 (1871), *quoted in supra* text accompanying note 141.

177. 319 U.S. 624, 642 (1943), *quoted in supra* text accompanying note 143.

178. *See supra* notes 40-75 and accompanying text; *cf.* Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978) (arguing that the Constitution has been irrelevant to judgments of the Supreme Court in the areas of freedom of religion and separation of church and state.)

179. Smith II, 110 S. Ct. ____, ____, 58 U.S.L.W. 4433, 4436 (1990).

therefore not surprising that the cases have commonly denied free exercise relief even while ostensibly applying *Sherbert's* standards.

Certainly, doctrinal clarity is not an end in itself and should be abandoned if the doctrine in question does not adequately serve its purposes. However, the argument that free exercise claims for exemption should be denied and relief granted solely under the speech clause does not seriously limit protection of free exercise activity. The most stringent constitutional standard of review, after all, is the one applied in speech cases.[180]

Any curtailment in the protection of religious exercise under this theory would occur only in the *scope* of which activities are covered. Even here, however, it is important not to overstate the significance of the exclusion. As we have seen, protection for religious liberty has been quite extensive under the speech clause, encompassing essential forms of religious exercise such as prayer, proselytism, and even some forms of religious conscientious objection.[181] Moreover, other claims that have been litigated exclusively as free exercise cases might easily be construed as involving protected speech activity as well. For example, in *Bob Jones University v. United States*,[182] the petitioners' claim that they should be entitled to tax-exempt status parallels the speech claim of the taxpayer in *Speiser v. Randall*,[183] who successfully argued that he could not be denied favorable tax treatment simply because he did not sign a loyalty oath. Simcha Goldman's[184] claim that his religious principles required him to wear religious headgear while serving in the military might have been successfully characterized as speech.[185] In *Tinker v. Des Moines Independent Community School District*,[186] the Court even recognized a student's decision to wear black arm bands as a mode of free expression.

Of course, the fact that potential free exercise claims can be

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180. Professor Laurence Tribe characterizes the right of speech as the "Constitution's most majestic guarantee." L. TRIBE, *supra* note 88, at 785.

181. *See supra* notes 32-39 and accompanying text.

182. 461 U.S. 574, 602-05 (1983) (non-profit private schools that prescribe and enforce facially discriminatory admissions standards on the basis of religious doctrine may be denied favorable tax treatment).

183. 357 U.S. 513 (1958).

184. Goldman v. Weinberger, 475 U.S. 503 (1986) (reasoning that the First Amendment does not require the military to accommodate those who wished to wear yarmulkes).

185. Curiously enough, Justice Stevens characterized Goldman's right to wear a yarmulke, in part, in speech terms. For Stevens, it was an "eloquent rebuke to the ugliness of anti-Semitism." *Id.* at 510-11 (Stevens, J., concurring).

186. 393 U.S. 503 (1969).

recharacterized as speech claims does not mean that they will be successful. A military officer who chose to wear a black arm band as a protest against war would probably not be entitled to an exemption from uniform requirements. The critical point, to repeat, is that the breadth of religious activity covered under the speech clause is already expansive and to a large degree includes the core of religious exercise. It is therefore only a modest loss in the scope of protection for religious activities that need be measured against the gains created by avoiding the problems inherent in exempting only religious activity.

It is even possible that some loss in the scope of protection could be remedied by an expansion of the parameters of the speech clause. Such expansion, however, even if moderate, is, as Professor Tushnet asserts, unlikely given the current composition of the Supreme Court.[187] Yet, since much of religious ritual is intended to convey ideas, it would not be too radical a step to protect such activity as symbolic speech.[188] Similarly, protection for the conscientious objection of both religious and non-religious persons could be realized under existing speech precedent.[189]

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187. Tushnet, *Religion*, *supra* note 9, at 718. It also may be ill-advised to characterize all religious activity as speech, since legislatively created exemptions for religion might then be suspect under a content-neutral speech analysis. *See infra* text accompanying note 202.

188. As Professor Ingber writes, "[m]ost religious rituals, rites, or ceremonies . . . are likely to be recognized and protected as symbolic conduct." Ingber, *supra* note 10, at 244 n.61 (citation omitted). He correctly cautions, however, that the right of speech is not implicated every time a person engaging in an activity "intends thereby to express an idea." *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

189. *See supra* notes 32-39 and accompanying text for an account of cases in which rights of conscience have been protected under the speech clause.

Several other cases suggest, however, that matters involving secular conscience may be protected under the rubric of religion. In *Welsh v. United States*, 398 U.S. 333 (1970), a claimant sought conscientious-objection exemption status from the draft based on his moral and ethical beliefs. The Court held that he was entitled to exemption under section 6(j) of the Universal Military Training and Service Act, although the statute authorized exemption only for those professing a religious objection to war. *Id.* at 340-43. Of similar effect is *Torcaso v. Watkins*, 367 U.S. 488 (1961), in which the Court recognized the right to refuse to take a religious oath on grounds of non-belief to be constitutionally protected under the free exercise clause.

Finally, in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Court, under the free exercise clause, protected a Jehovah's Witness who objected to working in an armaments factory but was unable to articulate the nature of his religious objection. The Court protected the claim although there was evidence that the tenets of the Witness's faith did not bar this employment, and the Indiana Supreme Court had concluded the claimant's objection was based on non-religious grounds. *Id.* at 719.

Nevertheless, even if freedom of speech were expanded, activities protected under this expansively interpreted clause would not necessarily lead to the same protection *in result* as if only religious exercise were protected. This is because the greater the range of activity for which constitutional protection is sought, the greater becomes the state interest in restricting that activity.[190] For example, although a state's interest in preventing overcrowding or fraud might not be severely compromised by the existence of eighteen members of a religious sect engaging in wandering solicitation at a state fair, its interest would be seriously compromised if those allowed to engage in that activity included all persons representing other groups protected by the speech clause, including political parties, other religions, and social-advocacy groups.[191] A court would, therefore, be more likely, when faced with the smaller class containing only religious claimants, to invalidate the state restriction.

However, this consideration only points to another of the many absurdities created by the free exercise exemption. The conclusion that a right to engage in a religious activity is more likely to prevail in the balancing equation when it implicates only free exercise (and not speech) leads to a startling conclusion: Because activities at the core of religion, such as prayer, worship, and the dissemination of ideas, are expressive,[192] they are less likely to be constitutionally vindicated under the current balancing test than are non-expressive activities of the periphery of religion.[193] There

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190. *See generally* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 134-35 (1982).

> [I]t is important to recognize not only the distinction but also the relationship between the strength of a right and the scope of a right . . . . The scope of a right is its range, the activities it reaches . . . . The strength of a right is its ability to overcome opposing interests (or values, or other rights) *within* its scope.").

Id.

191. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) ("[T]he inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit."). In *Heffron*, the Minnesota Supreme Court had originally upheld the right of the Hare Krishnas to engage in peripatetic solicitation at the Minnesota State Fair primarily because there were so few members of the sect present and the state's interest in preventing congestion and fraud was not severely threatened. International Soc'y for Krishna Consciousness, Inc., v. Heffron, 299 N.W.2d 79 (Minn. 1980), *rev'd*, 452 U.S. 640 (1981).

192. *See* L. TRIBE, *supra* note 88, at 1247 n.36 ("[T]he right to disseminate ideas lies at the core of religious practice."); Galanter, *supra* note 106, at 274 ("[B]elief, prayer, and worship . . . comprise . . .the central and essential core of religion.").

193. *Compare* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir.

is no coherent purpose served by this result.[194]

D. Legislative Exemptions for Religion — A Cautionary Note

The previous section demonstrates that establishment and speech concerns lead to the rejection of the constitutionally based free exercise exemption. It therefore raises the issue of whether legislative exemptions for religious activity are unconstitutional as well.[195] Although this Article does not attempt to provide an in-depth analysis of the constitutionality of legislative exemptions, a brief response to the contention that a rejection of constitutionally based exemptions requires invalidation of legislative religious exemptions is in order.

The first issue centers on establishment. The arguments against constitutionally compelled free exercise exemptions depend, in part, on anti-establishment policies. These arguments do

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1984), *vacated on other grounds*, 475 U.S. 534 (1986) (speech right to convene prayer group on public school property denied) *with* Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise right to receive unemployment compensation benefits pursuant to state statute upheld despite religiously based unavailability for work).

194. Treating free exercise claims as expression may not entirely eliminate the constitutionally compelled exemption. In extraordinarily limited circumstances, the speech clause has been interpreted as requiring exemptions from otherwise neutral laws. Specifically, exemptions have been required from the application of disclosure requirements to unpopular groups on the theory that disclosure might open the group's membership or business contacts to reprisals and harassment. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 100-01 (1982) (Ohio Campaign Expense reporting law requiring political candidates to report contributors and recipients held not to apply to Socialist Workers Party because of probability of harassment and reprisal); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (NAACP's membership lists protected from state scrutiny because of past public hostility and reprisal).

The purpose behind the free speech exemption is to assure that controversial ideas are not driven from the marketplace. *See* Stone & Marshall, *supra* note 3, at 613 ("The potential to drive an unpopular 'minor' party out of existence is so severe that extraordinary measures are warranted to avoid that result."). Accordingly, the standards for this exemption are extremely stringent — they demand a showing that without the exemption, the organization's existence would be threatened. *Id.*

195. Some answer to this issue might be found in Smith II, 110 S. Ct. ____, 58 U.S.L.W. 4433 (1990), where the Court heartily endorsed the availability of legislative exemptions even as it was cutting back on constitutionally compelled exemptions. *Id.* at ____, 58 U.S.L.W. at 4438. In practice though, the issue of the constitutionality of statutory exemptions for religion and religious activity has had mixed results before the Supreme Court. *Compare* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (exemption from Civil Rights Act of 1964 allowing certain types of religious discrimination by religious employers upheld) *and* Gillette v. United States, 401 U.S. 437 (1971) (Selective Service Act exemption for conscientious objection upheld) *with* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (sales tax exemption for religious publications invalidated).

not, however, call for the invalidation of legislatively created exemptions under the establishment clause. In certain cases, establishment clause concerns might inform free exercise analysis and, conversely, free exercise concerns may inform establishment analysis without either provision being violated. Professor McConnell is correct when he asserts that there is room between the two clauses for permissible government action.[196] Moreover, the establishment inquiry asks a very different question than does free exercise; specifically, establishment asks whether the challenged government action connotes the *endorsement* of religion.[197] Legislative exemptions from certain types of regulation do not imply this endorsement as readily as do affirmative grants or subsidies.[198]

This is not to suggest that legislative exemptions should be immune from establishment clause review. The Court has indicated, for example, that an "unyielding weighting" of a state provision in favor of religion may raise establishment concerns.[199] Statutory exemptions from regulations directly affecting the dissemination of ideas or otherwise allowing religious groups to disproportionately extend their "worldly influence" may also be particularly suspect under establishment analysis.[200] These estab-

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196. McConnell, *Accommodations*, *supra* note 9, at 3 ("[B]etween the accommodations compelled by the Free Exercise Clause and the benefits to religion prohibited by the Establishment Clause there exists a class of permissible government actions toward religion, which have as their purpose and effect the facilitation of religious liberty.").

197. *See* Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 497 (1986). For a criticism of the "no endorsement test," see Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement Test"*, 86 MICH. L. REV. 266 (1987) ("[T]he 'no endorsement' test is riddled with analytical flaws that can only compound confusion and inconsistency afflicting the current establishment doctrine.").

198. *See* Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981) ("The state does not support or establish religion by leaving it alone."); Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 329-30 (1986) (exemptions for religious organizations may be an appropriate accommodation of church and, therefore, not unconstitutional).

199. Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985) (Connecticut statute that provided an absolute right to sabbath observers not to work on the sabbath violated the establishment clause because the primary effect was to advance a particular religious practice).

200. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). In this regard, Judge J. Skelly Wright's observation in addressing a claim that religious broadcasters should be exempt from FCC anti-discrimination requirements is noteworthy: "[S]ponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the

lishment limitations on legislative exemptions exist, however, irrespective of the specific arguments advanced in this Article.

The conclusion that free exercise is not independent from speech has more serious implications for review of legislative exemptions under the speech clause. If religious activity is speech, favorable treatment for religious activity would presumably violate the content-neutrality requirements of the speech clause. For example, if the hiring and firing of employees is considered symbolic speech, the Title VII exemption from liability of religious employers in certain hiring and firing decisions could be construed as a content-based regulation. The Title VII exemption might, therefore, be unconstitutional under the speech clause, despite being constitutional under the establishment clause.[201]

On the other hand, this concern may be overstated. There is no absolute prohibition against statutorily exempting certain speech from government restrictions on expression. For example, in *Regan v. Taxation With Representation of Washington*[202] the Court held that the exclusion of tax-exempt veterans' organizations from the lobbying restrictions imposed on other tax-exempt organizations was not an invalid, content-based regulation, even though the exemption, in effect, granted the veterans' groups a lobbying subsidy.[203] A similar theory could be developed to support some legislative exemptions for religion.

IV. THE SOLUTIONS OF THE COMMENTATORS: HOW LITTLE THE DIFFERENCE?

Perhaps the strength of the argument against the constitutionally compelled exemption is best judged by comparing it with the proposals of those who are more favorable to the free exercise claim for exemption. Particularly interesting is that a substantial

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wealth and inclination to buy up pieces of the secular economy." *Id. See also* Texas Monthly v. Bullock, 109 S. Ct. 890 (1989) (Texas sales tax exemption for religious publisher violates establishment clause since it does not provide similar benefits to non-religious publishers); Marshall & Blomgren, *supra* note 198, at 329-30 (exemptions for religious institutions, especially from regulations affecting the political process, the media, and other areas in which dissemination of ideas is important, confer benefits on these religious institutions).

201. *See* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (holding that section 702 of Title VII of the Civil Rights Act of 1964, which exempted religious 'organizations' from a prohibition against religious discrimination in employment, did not violate the establishment clause).

202. 461 U.S. 540 (1983).

203. *Id.* at 546-51.

difference in theory has not led to a substantial difference in result.

To be sure, most commentators, although critical of a minimalist free exercise approach, offer no methodology for deciding free exercise claims.[204] Some have proposed a unitary inquiry for free exercise and establishment, but in their efforts to provide a broad theoretical understanding of the religion clauses, they have left the issue of free exercise exemptions largely unaddressed.[205] Professors McConnell, Pepper, and Lupu do provide solutions, but on close inspection their solutions are not significantly different from the current jurisprudence or, indeed, from the free exercise as expression thesis.

Concerned about the threat to religious values posed by governmental inquiry into sincerity and definition, Professor McConnell posits that religious exemptions should be recognized in cases where the government is already reviewing claims on a case-by-case basis:

> When decisions must be made quickly, authoritatively, and even-handedly by operational personnel, the government may be entitled to resist interposing requirements of religious accommodation. But when decisions already involve case-by-case, subjective considerations, there should be little procedural objection to requiring the government to take religion into account as well.[206]

Certainly McConnell's distinction does help explain why religious claims were upheld in the unemployment compensation cases[207] while denied in other cases, such as the military uniform case of *Goldman v. Weinberger*.[208] In the unemployment compensation cases, the state was involved in discretionary decision-making, while in cases such as *Goldman* it was not.

Nonetheless, why is the threat to religious liberty any less serious when sincerity and definition determinations are made by an individual accustomed to other types of discretionary decision-making than it is with persons "who otherwise . . . exercise little

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204. For an interesting effort to apply economic analysis to religion clause claims, see McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

205. *See* Choper, *supra* note 94; McCoy & Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986).

206. *See* McConnell, *Neutrality*, *supra* note 56, at 156.

207. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

208. 475 U.S. 503 (1986).

discretion to make ad hoc judgments?"[209] McConnell argues that the judgments of the latter would likely be the product of highly subjective perceptions and therefore insufficiently sensitive to the needs and practices of unfamiliar religious faiths. The experienced decision-maker would be in a dissimilar position.[210] Yet, it seems questionable that an unemployment benefits official trained in deciding what constitutes a valid secular reason to be unavailable for work would be able to evaluate, for either sincerity or religiosity, a claim such as that advanced by Eddie Thomas, that his religious conviction forbade him to work in an armaments factory. An unemployment benefits officer and any official unaccustomed to discretionary decision-making would probably be equally incompetent to judge either the sincerity or the religiosity of Thomas's claim.

Professor McConnell does not limit the situations in which free exercise claims for exemptions should be recognized to cases involving pre-existing procedural mechanisms for case-by-case determinations. He states that "in some instances the religious claim for exemption will be so strong that the government may be required to establish procedures for its protection."[211] Nevertheless, it is clear that the primary mechanism McConnell employs to avoid the definition/sincerity dilemma prevents significantly expanded notions of free exercise protection. Moreover, even his modest proposal does not avoid the inquiries acknowledged as threatening to religious liberty interests.

Professor Pepper, on the other hand, is less deterred by the threats to religious liberty that the inquiry into sincerity and definition creates. He argues that, in order for free exercise to be taken seriously, the sincerity inquiry must also be taken seriously.[212] There is some question, however, whether Professor Pepper's sincerity inquiry is workable.[213] Justice Jackson's dissent in

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209. McConnell, *Neutrality*, *supra* note 56, at 156.

210. *Id.*

211. *Id.* at 157.

212. Pepper, *supra* note 17, at 325-31.

213. Professor Pepper advocates a bifurcated approach. *Id.* at 327-30. He suggests that when an exemption might invite fraudulent claims, such as exclusion from taxes, the recognition of the legitimacy of a claim for exemption should be relatively circumscribed. *Id.* at 328. In other cases, the Court should face the sincerity question directly by examining such factors as past conduct and by seeking the testimony of corroborating witnesses. *Id.* Pepper acknowledges the possibility of error in the sincerity inquiry but asserts that such error is "simply . . . a cost of granting a meaningful constitutional privilege in this area." *Id.*

Ballard, in which he questioned the possibility of making any judgments about religious sincerity without also making judgments about religious credibility, still rings true.[214] How can one evaluate the sincerity of a religious claim without evaluating its believability, and if the inquiry into believability is prohibited by the religion clauses, how can one question sincerity at all? Even more important for present purposes, however, is how Professor Pepper would deal with the definition of religion. His response, motivated in part by the "secularization of society," is to create a generalized protection for conscience, including matters of conscience that are beyond religious derivation.[215] Professor Pepper, in short, agrees with the central contention of this Article: that religious and non-religious rights should be treated equally. He would simply protect non-religious activities through the free exercise clause. Perhaps the difference between the approach advocated by Professor Pepper and the one advocated here is merely a matter of semantics.

Professor Ira Lupu has also advanced a theory worth noting at this point. Lupu's theory primarily addresses the burden inquiry in free exercise analysis and not the constitutionally compelled free exercise exemption itself.[216] However, since his position implicitly accepts the propriety of the exemption, it sheds light on some of the relevant issues.

Indeed, Professor Lupu begins with one of the central contentions set forth here: The religiosity and sincerity inquiries required in free exercise analysis are highly problematic and potentially threatening to religious values.[217] In fact, his proposal of a threshold burden inquiry is primarily designed to minimize the need for the religiosity and sincerity inquiries.

Specifically, Lupu's proposal is that the inquiry into whether religious exercise is burdened by government action is best accomplished by reference to common law principles rather than to inde-

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214. United States v. Ballard, 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting) ("If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."), *rev'd on other grounds*, 329 U.S. 187 (1946).

215. Pepper, *supra* note 17, at 332.

216. *Lupu, Burdens*, *supra* note 43, at 936 (although many aspects of free exercise have been well canvassed, little has been written about the threshold requirement for all free exercise claims).

217. *Id.* at 953-60. Lupu also discusses the centrality inquiry that some courts have used in free exercise analysis along with religiosity and sincerity. *Id.* at 958-59.

pendent religious determination.[218] Courts will be asked to ascertain whether the government action infringes on religious exercise by examining the infringement according to common law constructs. Thus, for Lupu, *Lyng*[219] is an example of a case where a common-law burden might exist because the Indians in that case had presumably developed a common law analog to an easement on the government property in question.[220] As applied, then, the common law principle becomes "a religion-neutral veil behind which judges in free exercise cases can assess burdens on religion from a more objective vantage point than is otherwise available."[221]

Interestingly, Lupu does not seriously dispute that his position "may coincide only roughly and fortuitously with our intuitions about what kinds of government intrusions upon religion are most severe or troublesome."[222] Nor does he argue why possibly fortuitous claims should be entitled to special and even unique exemption. Rather, instead of a claim for favoritism, Lupu's position is ultimately based on the conclusion, wholly accepted here, that existing free exercise methodology should be replaced with a more workable and less manipulable approach.[223]

V. Failure to Take Religion Seriously

At this point, a reader unfamiliar with the literature might be perplexed: If both sides of the free exercise debate agree 1) that the breadth of religious activity currently protected outside the free exercise clause is extensive, 2) that there are problems in either allowing or disallowing the free exercise, constitutionally compelled claims for exemption, and 3) that the results that would be achieved under the competing proposals are not dramatically different, then what is all the fuss about? Why is the debate over free exercise rights so strident?

The answer appears to be that the disagreement is not with

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218. *Id.* at 966-77.

219. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

220. Lupu, *Burdens*, *supra* note 43, at 973-76. Lupu also argues that *Sherbert*, *Thomas*, and *Hobbie* meet his common-law test because they are an infringement on the modern day property concept of "entitlement." *Id.* at 977-82. In contrast, government policies which create only "psychic pressure on a religious minority to conform to or to believe in general community norms" would not meet a common law burden inquiry. *Id.* at 964.

221. *Id.* at 971.

222. *Id.* at 970.

223. *Id.* at 972.

the free exercise clause at all, nor is it with the constitutionally compelled exemption. Rather, the basic dispute concerns the manner in which existing constitutional law treats religious claims. Critics contend that the current jurisprudence and the approach advocated here are, in essence, antagonistic to religion.[224] If the results in the cases have been criticized as not taking free exercise seriously, then the jurisprudence as a whole has been accused of not taking religion seriously. Purportedly it has failed to incorporate a religious, as opposed to a secular, understanding of religion into its methodology.

There are three manifestations of this criticism. One is that contemporary constitutional theory rejects religion because it sees religion as irrational.[225] A second is that it rejects religion because constitutional theory is individual-rights oriented, while religion is communal.[226] A third is that constitutional theory has failed to accept religion on the latter's own terms because constitutional theory is based upon notions of freedom of choice, while religion is based upon notions of absolutism and obligations to a transcendent authority, notions which deny the right to choose any competing value systems.[227]

There is anger in these criticisms. By treating religion as simply one form of belief, by failing to take religion on its own nonrational terms, liberal constitutional theory, according to the critics, has held religion in contempt. Professor Carter states this attack most strongly in connection with his claim that liberal constitutional theory rejects religion as irrational:

> It is [the] intuition — the understanding that religion and reason exist in tension with one another — which bottoms the liberal discomfort from public religious argument. In the end we

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224. *See infra* notes 225-28 and accompanying text.

225. Carter, *supra* note 8, at 985-92 (arguments are addressed to what author terms contemporary liberalism's treatment of religion); *see also* Gedicks & Hendrix, *supra* note 162, at 1604-05 (under objective legal analysis, religion appears irrational).

226. *See, e.g.*, Tushnet, *Religion*, *supra* note 9, at 729-38 (recognizing the difficulty of fitting religion into constitutional law categories and suggesting that the existing confusion might be alleviated by interpreting the religion clauses under a unifying doctrinal or theoretical approach).

227. *See* Ingber, *supra* note 10, at 283 ("Constitutionalism . . . stresses the sanctity of individual choice, freedom and dignity . . . . [R]eligion itself often is [inconsistent with this individualistic orientation]."); Sandel, *supra* note 10, at 610 ("Madison and Jefferson understood religious liberty as the right to exercise religious duties according to the dictates of conscience, not the right to choose religious beliefs. In fact, their argument for religious liberty relies heavily on the assumption that beliefs are not a matter of choice.").

> come back to the beginning; those who believe that God can heal disease are dangerous primitives. They are primitive because they do not celebrate reason as the path to the knowledge to the world. They are dangerous because if they do not celebrate reason, they may not be amenable to reason, and anyone not amenable to reason is a threat to liberal society.[228]

Unfortunately, some needless objection to religion has been set forth in the religion clause jurisprudence. The suggestion in some establishment clause cases[229] and some commentary[230] that religion must stay out of politics and public life seems inappropriate, if not impossible.[231] Similarly, the underlying premise in the parochial-aid cases, that teachers in religious schools are incapable of teaching secular subjects without inculcating religious values, is particularly unfair.[232] Nevertheless, it is a mistake to ascribe a restrictive view of the legitimacy of the free exercise exemption to hostility towards religion.

First, the argument that constitutional theory rejects religion because of the latter's supposed irrationality is simply a red herring. A great deal of irrational activity has been protected under the constitution, including that so-called model of rationality, the speech clause. Paul Cohen's statement on the back of his jacket, for example, was not a form of logical discourse.[233] The protecting of intimate association under the due process clause is also a trib-

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228. Carter, *supra* note 8, at 992.

229. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) ("Ordinarily political debate and division, however vigorous even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."). For a critical account of the establishment clause cases see Gaffney, *supra* note 162, at 225 (The idea that religion and politics cannot be combined is "bad law, bad politics, and bad theology").

230. *Cf.* J. RAWLS, A THEORY OF JUSTICE (1971) ("Justice and a just society are not dependent on each other because there "is no place for the question whether . . . men's perception of the religious practices of others might not be so upsetting that liberty of conscience should not be allowed.").

231. *See, e.g.*, A.J. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 348-49 (1985) ("[R]epublican government depends for its health on values that over the not-so-long run must come from religion.").

232. *See* Aguilar v. Felton, 473 U.S. 502 (1985) (assuming that teachers employed by the state to teach in a religious school might inculcate religious doctrine, although the record established that there had not been such an incident in the nineteen years the aid program had been in effect); Meek v. Pittinger, 421 U.S. 349 (1975) ("A Pennsylvania statute that authorized state funding for teachers of private-school students created "the danger that religious doctrine [would] become intertwined with secular instruction").

233. Cohen v. California, 403 U.S. 15 (1971) (The jacket bore the message "Fuck The Draft").

ute to the constitutional acknowledgment of the value of the non-rational aspects of human life.[234]

More importantly, constitutional theory does not blindly accept secular positions as based on reason, nor does it blindly reject religion as based on non-rationality. The two spheres are not mutually exclusive.[235] Rationality does not end where religion begins, nor does rationality begin where religion ends. Indeed, as noted above, first principles, including the notion that reason can be used to solve human problems, are based on their own non-rational beliefs and *a priori* assumptions.[236] I personally find the assumption that currently underlies the economic analysis of law, that "man is a rational maximizer of his self-interest,"[237] to be one of the great irrational leaps of faith of the twentieth century.

What is true, as Professors Gedicks and Hendrix claim, is that the languages of law and religion are incongruent. Law's language of "objectivity, rationality, and empiricism" is not compatible with religion's language of "faith, belief, and divine judgment."[238] However, the inability to capture the essence of religion in a logical medium is not hostility to religion; rather, it is the inevitable result of placing any non-rational belief system, religious or secular, into a rational process.[239]

The contention that free exercise jurisprudence demonstrates the inability of constitutional law to come to grips with non-individualistic values is perhaps partially correct, but, in any event, essentially misses the point. Constitutional theory has had difficulty providing a framework within which communal rights can be protected.[240] However, free exercise is not the only area in which this has occurred and, indeed, it is not accurate to place free exercise rights solely in the communal-rights camp. Religious exercise is often individualistic,[241] and non-religious value systems

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234. *See generally* Karst, *supra* note 126 (discusses the value of intimate association and the scope of the constitutional doctrines utilized as the underpinnings of this freedom).

235. *See* Greenawalt, *Rationality*, *supra* note 162, at 1062 ("[R]eligious convictions are part of the groundwork against which rational arguments are set.").

236. *See supra* note 132 and accompanying text.

237. R. POSNER, ECONOMIC ANALYSIS OF LAW 4 (1986).

238. Gedicks & Hendrix, *supra* note 162, at 1604-05.

239. *Id.* Gedicks and Hendrix would argue, however, that law's language should more actively attempt to accommodate non-rational belief systems. *Id.* at 1603-10.

240. Garet, *supra* note 114, at 1003-04, 1029-36; Tushnet, *Religion*, *supra* note 9, at 702.

241. For example, Eddie Thomas's objection to working in an armaments factory was apparently idiosyncratic. *See* Thomas v. Review Bd. of the Ind. Employment Sec. Div.,

and beliefs are often communal.[242] More importantly, the non-individualist criticism strays far from the attack on the rejection of the free exercise exemption. Even if the jurisprudence unduly minimizes communal rights, the question remains why religious, and only religious, groups or individuals should be entitled to exemption.

The critics are correct, however, when they contend that constitutional law does not recognize religious claims, or at least the claims of some religions,[243] to transcendent authority. Constitutional law does not recognize that to some religious adherents, religious beliefs are not products of individual choice, but are absolute truths imposed by an external authority. Liberal constitutional theory, in short, treats religion as simply another belief system. As Professor Michael Smith writes, "[t]he very propensity to identify freedom of religion with freedom of speech implies that religion is primarily a secular activity. It assumes that thought and expression, whether in the realm of politics, science or religion, are basically alike."[244]

The mistake, however, is to view this treatment as pejorative. Constitutional theory protects freedom of choice by assuming that there are a number of belief systems that an individual may adopt and that the individual is free to choose among the competing systems. Liberal constitutional theory recognizes the possibility that any one of the belief systems may be true, but because its underlying theory is based on possibility rather than authority, it cannot treat any particular system as the Truth.[245] Thus, liberal theory reacts to the belief of the religious adherent as if that individual chose her particular belief system rather than having had the

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450 U.S. 707 (1981) (refusal of Jehovah's Witness to work on military-related project based on personal interpretation of scripture rather than specific Jehovah's Witnesses doctrine).

242. Garet, *supra* note 114, at 1008-09 ("[A]ssembly, religion, equality [all] have groupness at their core.").

243. Ingber, *supra* note 10, at 283-86 (distinguishing between "group ideology," which he argues ought to be subordinated to the Constitutional ideology, and religion, which is based on "duties or obligations that precede those made by human beings" and ought therefore not be subordinated to a constitutional ideology).

244. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83 at 116; *see also* Carter, *supra* note 8, at 978 (arguing that the liberal constitutional jurisprudence threatens to turn religious belief into "a kind of hobby"); Pepper, *supra* note 17, at 307 ("From a modern constitutional perspective, religion is more likely to be perceived as akin to race: of no intrinsic importance, but subject historically to abuse and persecution and therefore 'inherently suspect' as a basis for government classification.").

245. McConnell, *Accommodation*, *supra* note 9, at 14-15.

truths and obligations of that belief system imposed upon her by transcendent authority.

This approach necessarily creates a tension between liberal constitutional theory and religion (or at least some religion). Liberal constitutional theory treats religious belief as a function of individual choice, while some religion treats religious beliefs as "externally imposed upon the faithful."[246] That liberal constitutional theory resolves this tension in favor of itself, by assuming that an individual's beliefs are the product of choice and not of externally imposed authority, is not indicative of hostility. An approach which treats religious beliefs as equal to non-religious beliefs cannot be characterized as hostile to religion; there is no antagonism in equal treatment.

Moreover, the hostility argument loses its force because it cannot seriously be contended that either the Court's current approach or a speech methodology is non-protective of religious values.[247] The constitutional standard applied in speech cases is, after all, the Court's most stringent.[248] The reluctance to inquire into sincerity and religiosity is also based on concerns protective of religious values.[249]

Additionally, although reliance on assumptions of individual choice may at some level conflict with absolutist understandings, one should not forget that principles of individual choice and religion are not always antithetical. Indeed, as Professor Giannella has argued, the protection of rights of choice benefits religion:

> The growth and advancement of a religious sect must come from the voluntary support of its membership. Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit . . . the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.[250]

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246. Ingber, *supra* note 10, at 282.

247. Giannella, *supra* note 133, at 517.

248. *See supra* notes 180-86 and accompanying text.

249. *See supra* notes 135-51 & 206-23 and accompanying text.

250. Giannella, *supra* note 133, at 517 (citations omitted); *see also* Gedicks, *supra* note 110, at 161 ("The importance of religious groups to individual and social life, which gives the groups their strong claim to constitutional protection, is interwined with the assumption that the creation or maintenance of an individual's membership in such groups is voluntary.").

It may be, however, that the reason liberal constitutional theory rejects absolutism in favor of its own methodology is more fundamental. Religious issues must be decided according to the methodology of constitutional theory because, after all, it is the constitutional issues involving religion that are being decided. Logically, for a constitutional theory based on freedom of choice to advance absolutism would be to deny itself. All liberal theory can do is recognize the varieties of beliefs and protect the rights of anyone who chooses to pursue a particular mode of belief, including an absolutist one.

The foregoing, of course, is no surprise to the critics. Indeed, it is their central contention. They would argue, however, that if liberal constitutional theory subordinates a religious understanding to, or exorcises it from, its treatment of religious cases, the methodology must be abandoned in favor of one more sympathetic to religious values.

The easy answer to this criticism is that liberal constitutional theory may have its deficiencies, but at least it provides a mechanism for deciding cases. Opposing methodologies have yet to offer solutions for deciding particular disputes.

The second response is a repetition of what has already been stated in this section: A methodology based upon the assumption that individual-choice theory is highly protective of religious activity and voluntarism itself may be beneficial to the development of religion. Religion may be critical of liberal constitutional theory's methodology, but it cannot be overly antagonistic to its results. Indeed, as to this latter point, it might be noted that, although the pressures of so-called secularism have increased in this century, participation in religion remains particularly robust.[251]

Finally, the claims of hostility to religion miss the mark because they ignore the fact that the rejection of the absolutist understanding of religion in favor of individual choice is itself deeply rooted in religious principle. Critics of the constitutional methodology have argued that the liberal state should defer to religion because religion seeks a Truth that is transcendant and because the possibility exists that a religious belief system reflects a tran-

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251. *See* M. MARTY, *supra* note 113, at 11-14 (discussing the revival of religion in American life); A.J. REICHLEY, *supra* note 231, at 2 ("By most measurable indices the United States is a more religious country than any European nation except Ireland and Poland.").

scendent truth.[252] This position suggests that it would be consistent with the liberal understanding to grant deference to belief systems that are possibly True. Yet, if there is true knowledge, there must also be false knowledge, and if the state should defer to the possibility of higher Truth, this goal may best be served by supporting notions of individual freedom rather than claims of externally imposed duties. Even though it is theologically controversial, one must not dismiss the argument that even if it does not reflect the religious absolutist's understanding of religion, liberal constitutional theory reflects a profoundly religious understanding of the search for Truth; specifically that the search must be a product of man's freedom rather than of his obligation.[253] Therefore, it is not anti-religious secularism to contend that the Constitution protects only *freedom* of religion and that the protection of religion itself, like the protection of any belief system, religious or secular, true or false, is only derivative.

CONCLUSION

The Supreme Court's efforts to construct a free exercise analysis which allows for the creation of constitutionally compelled free exercise exemptions have been unsuccessful. The cases have been inconsistent, the results troubling, and the methodology confused.

The difficulties within the free exercise jurisprudence, however, are not only methodological. The maintenance of the free exercise exemption does not intelligibly, or even stringently, protect religious values and religious liberties. Indeed, by requiring investigation into definitions of religion and sincerity of religious claims, the exemption is counterproductive to religious values.

Most importantly, however, the constitutionally compelled free exercise exemption sets forth a false dichotomy between secular and religious belief systems and ignores the similarity of their functions and effects in the political and social environment. By preferring religious belief systems over all others, including philosophical, moral, and political belief systems, this exemption offends the equality-of-ideas notion that is at the core of constitu-

252. *E.g.*, McConnell, *Accommodation*, *supra* note 9, at 14-15.

253. Indeed, some would suggest that it is the absolutist position that demeans religion. *See generally* F. DOSTOEVSKY, THE BROTHERS KARAMAZOV, "THE GRAND INQUISITOR" 264-70 (C. Garnett trans. Modern Library ed. 1950) (God offers man freedom, religion offers miracle, mystery, and authority).

tional law. For this reason alone, the argument for constitutionally compelled free exercise exemptions should be rejected. Rejecting constitutionally favored treatment for religion will assure that one type of belief system is not artificially and unalterably fortified to the detriment of another.